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IN THE

# Supreme Court of the United States

DARLETA ROCHELLE JOHNSON,

*Petitioner*,

v.

TRANSIT MIX CONCRETE & MATERIALS CO. AND TRINITY MATERIALS, INC.,

*Respondents.*

**On Petition for a Writ of Certiorari to the Texas Court of Appeals for the Eleventh District**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.*, preempts less stringent state law and imposes upon a mine's owner-operator a nondelegable duty to follow mandatory safety standards promulgated under the Act's authority so that a violation of those standards constitutes evidence of negligence for injuries suffered by workers at the mine site, regardless of whether they are employed by the principal or by an independent contractor?

## PARTIES TO THE PROCEEDINGS

Petitioner is Darleta Rochelle Johnson, individually, as representative of the estate, and as next friend of Brad Johnson, Jr., Jerelle Johnson, and Amethyst Johnson, minors.

Respondents are Transit Mix Concrete & Materials Co. and Trinity Materials, Inc., treated below by stipulation as a single entity.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Darleta Rochelle Johnson respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals for the Eleventh District in this case.

## OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Eleventh District (App., *infra*, 1a-6a) is reported at 205 S.W.3d 92. Review was denied by the Texas Supreme Court. (App., *infra*, 19a). The judgment of the 58th District Court, Jefferson County, Texas (App. *infra*, 7a-18a) is unreported.

## JURISDICTION

The Texas Supreme Court denied review on February 22, 2008 and denied rehearing of the petition for review on June 27, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED (SEE APPENDIX 22a-65a)

Pertinent provisions of the U.S. Const. art VI are given at App. 21a.

Pertinent provisions of the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801-964 are given at App. 23a-52a.

Pertinent provisions of 30 C.F.R. § 46 and § 48 are given at App. 53a-64a.

## INTRODUCTION

This petition seeks review of a decision by the Texas Court of Appeals, which completely ignored the preemptive and superseding impact of federal law on Texas's treatment of a mine operator's liability for fatal injuries suffered by a worker on its property. Applying the general rule that a principal owes no duty to a worker employed by an independent contractor and failing to address relevant federal law establishing such a nondelegable duty, the court vacated a jury verdict already remitted by the trial judge.

State courts that have considered the question presented have split on whether the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801-964 ("Mine Act"), imposes civil liability on the mine's owner-operator for violations of mandatory health and safety requirements when an independent contractor's employee is injured. The federal circuits, however, have uniformly found that an owner-operator and qualified independent contractors are jointly liable administratively for such violations resulting in injuries.

The court below drew a distinction between the health and safety responsibilities owed by the mine owner to its own employees and those workers on its premises but employed by independent contractors, when the Mine Act specifically eschews that distinction. In fact, although the Texas Court of Appeals concluded that the mine's operator had no responsibility for the fatal injury in this matter, the federal Mine Safety and Health Administration issued a citation to that operator, Respondent

Transit Mix, for its violation of mandatory safety standards resulting in that death. (*See* App. 73a-74a)

In enacting the original Mine Act in 1969, and then enacting a successor statute in 1977, Congress recognized that work at mine sites remains one of the most dangerous of jobs. The 1977 Act adopted the prevailing judicial construction and expanded the definition of "miner" to include employees of independent contractors working at the mine site, even when their work did not consist of what is generally thought of as mining. The regulations promulgated pursuant to the Mine Act's authority are mandatory and include training responsibilities on the part of the owner-operator for employees of independent contractors. A failure to implement those standards and provide necessary training in this particular instance proved fatal.

State courts' diffidence on owner-operators' responsibility for independent contractors frustrates the federal remedial purpose behind the Act and undermines the health and safety of those working at a mine, contrary to the express purpose of the federal act, which seeks to instill greater safety at a palpably dangerous worksite and recognizes that those dangers equally affect independent contractors.

## STATEMENT OF THE CASE

### A. Factual Background

Brad Johnson, Sr., died as a result of injuries received in February 1999 while working at a sand and gravel mine owned and operated by defendants Transit Mix Concrete & Materials Co. and Trinity

Materials, Inc., treated below by stipulation as a single entity (hereinafter "Transit Mix"). Johnson was employed by RDO Equipment Company, a dealer in heavy equipment which would detail its mechanics to work with Transit Mix's maintenance personnel at the mine on problems with the equipment. Johnson was sent to the mine, where a Transit Mix supervisor assigned Johnson to effect brake repairs on a massive dirt hauler, known as a Euclid B-30, even though Johnson had never worked on the enormous vehicle before. Mandatory federal regulations and the mining company's own rules required Transit Mix to provide Johnson with training in the safe discharge of the assigned task. Transit Mix was alerted to the danger months earlier when the agency had sent a relevant alert, known as a fatalgram, about a fatality at a mine involving precisely the danger that killed Johnson. Transit Mix undertook no training, but it did supply Johnson with equipment and tools to accomplish the work, specified how the work could be accomplished, assisted him in attempting to complete the task, and supervised the job.

To access the brakes, Johnson had to remove a six-foot high tire, weighing 1,500 pounds. (App. at 69a). The tire was stuck on the vehicle from dried and caked mud and sand. Johnson consulted with Transit Mix employees and undertook the task of removing the tire together with them, to no avail. (6 RR 99, 112, 114, 116-17; App. at 71a). Johnson eventually suggested using heat to dislodge the debris. A Transit Mix supervisor acceded to the plan,

and Johnson was supplied with a Transit Mix acetylene torch.[1] (5 RR 104-06; 6 RR 117).

After one oxygen tank for the torch was expended, a second was supplied. (6 RR 152). The Transit Mix supervisor for the task, then passing by, saw Johnson undertake use of the torch, but apparently found it appropriate and said "Okay" when Brad said he was trying to remove the wheel with heat. (4 RR 250-52). The heat from the torch, however, ignited gases in the tire, causing it to explode. (6 RR 120; App. at 72a). Johnson was thrown by the explosion, his pants leg was on fire, and he lay unconscious without a pulse. (App. at 72a). The fire was put out, and Johnson began to breathe again after first aid was administered. (*Id.*). The explosion caused Johnson severe injuries including a badly damaged left lung and arm, multiple left rib fractures, and a broken jaw. (7 RR 7-10). In treatment, Johnson's left arm was amputated, he was outfitted with draining tubes for his injured lung, and he was subjected to a tracheotomy. (7 RR 9-11). Nonetheless, he died 13 days later from complete organ failure. (7 RR 11).

Only months earlier, the federal Mine Safety and Health Administration (MSHA) had notified all mine operators, including Transit Mix, that a worker at another mine had died in an explosion resulting from the application of heat to a similar huge tire. MSHA warned mine operators never to apply heat to a tire

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[1] Under longstanding Texas precedent, the very "act of furnishing the trappings" needed for the task meant that "[defendant] considered . . . their use . . . necessary to the proper and successful execution of the work confided to [the independent contractor]." *Drennon v. Patton-Worsham Drug Co.*, 109 S.W. 218, 219 (Tex. App. 1908).

rim. (Px 28, 29). The fatalgram notice was the type of bulletin that neither Johnson nor his employer would ever have seen because it was directed solely to mine operators under MSHA's jurisdiction. Transit Mix officials later admitted that, if they had heeded the warning, Johnson's death would not have occurred. (3 RR 15; 4 RR 53-56, 114-15, 119, 165).

### B. Proceedings Below

Johnson's widow, Darleta Rochelle Johnson, brought suit on her own behalf, on behalf of Johnson's estate, and on behalf of his three minor children. After a trial in the 58th District Court, Jefferson County, a jury awarded Johnson's estate and survivors nearly $164 million in damages. The trial court remitted the award to $27,357,090.83. (App. at 16a).

The Texas Court of Appeals for the 11th District (Eastland), reversed, holding that Transit Mix did not exercise sufficient control over Johnson so as to create any duty to him under Texas law. The court employed the general rule that a principal owes no duty to an independent contractor unless the principal retains some control over the manner in which the work is performed. (App. at 4a-5a). The court of appeals specifically found that Transit Mix employees made suggestions but did not provide the type of detailed instructions that would amount to control. (App. at 3a). The court's opinion did not mention or discuss the Mine Act or its regulations, or its relationship to the determination of whether Transit Mix owed Johnson any duty, even though Plaintiff asserted its relevance. The Texas Supreme Court declined further review. (App. at 19a).

## REASONS FOR GRANTING THE PETITION

This case raises an important issue concerning whether states may frustrate a nondelegable federal duty to the safety of all workers on the part of a mine's owner-operator by either ignoring federal law or discounting it in the course of a state tort case. Congress enacted the Mine Act in the knowledge that mining operations are among the most dangerous worksites in America. *See* 30 U.S.C. § 801(b). In doing so, Congress recognized dangers inherent in mining operations and the "tragic consequences" it can entail. *Speed Mining, Inc. v. Fed. Mine Safety and Health Review Comm'n*, 528 F.3d 310, 316 (4th Cir. 2008).

The Act announces that the "first priority" in any mining operation must be "the health and safety of its most precious resource--the miner." 30 U.S.C. § 801(a). It further expresses its concern with "deaths and serious injuries from unsafe and unhealthful conditions and practices" at mines, as well as the "urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm." *Id.* at 801(b) & (c). The Act acknowledges that "primary responsibility" to assure safety rests with the "operators of such mines." *Id.* at 801(e).

The Act purposely defines the term "miners" expansively to include all who work on the mine property, whether employed by the principal or an independent contractor regardless of its role. 30 U.S.C. § 802(g) (a miner is "any individual working

in a coal or other mine"). *See also Bituminous Coal Operators Ass'n v. Sec'y of Interior*, 547 F.2d 240, 245 (4th Cir. 1977) (recognizing that a contractor's employee qualifies as a miner for purposes of the Mine Act).

A Senate report accompanying the Mine Act states that Congress intended to adopt the Fourth Circuit's broad reading in *Bituminous Coal* of the predecessor act to assure coverage of independent contractors. S. Rep. No. 95-181, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414 (hereinafter Senate Report). *See also Joy Technologies Inc. v. Sec'y of Labor*, 99 F.3d 991, 996 (10th Cir. 1996) (describing the progression from interpretation in *Bituminous Coal* to statutory confirmation in the 1977 Miner's Act).

The statutory terminology regarding working in a mine embraces "a sweeping definition for a mine, encompassing much more than the usual meaning attributed to it." *In re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 590 (5th Cir. 2000), citing *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 936 (6th Cir. 1997). It includes both the area of land from which minerals are extracted, as well as "facilities . . . used in, or to be used in . . . the milling of such minerals." 30 U.S.C. § 802(h)(1). As a result, the Mine Act means what it says and covers "*any* independent contractor performing services at a mine." *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990). *See also Speed Mining*, 528 F.3d at 314 (calling this conclusion the subject of "uncontradicted precedent"); *Joy Technologies*, 99 F.3d at 999 (finding an independent contractor covered by the Mine Act for work servicing

equipment similar to the work undertaken by Johnson in the instant case).

Applying that inclusive approach, the Fourth Circuit has held that "[i]t is settled law in this and other circuits that the Secretary [of Labor] possesses the discretionary authority to cite owner-operators, independent contractors, or both for safety violations committed by independent contractors." *Speed Mining*, 528 F.3d at 311; *see also Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006); *Cyprus Indus. Minerals Co., v. Fed. Mine Safety and Health Review Comm'n*, 664 F.2d 1116, 1119 (9th Cir. 1981). Thus, every circuit recognizes that federal law imputes violations of an independent contractor to the owner-operator.

Among the Mine Act's stated purposes is the establishment of "mandatory health and safety standards." 30 U.S.C. § 801(g); *see also Sec'y of Labor v. Cannelton Indus. Inc.*, 867 F.2d 1432, 1433 (D.C. Cir. 1989). It is standard practice to "construe broadly the Act's coverage to achieve this goal." *United Energy Servs., Inc. v. Fed. Mine Safety & Health Admin.*, 35 F.3d 971, 975 (4th Cir. 1994); *see also Cannelton Indus.*, 867 F.2d at 1437 (concluding that Congress intended the Mine Act to be construed liberally to accomplish its remedial purposes); *Cyprus Indus.*, 664 F.2d at 1118 (same). Thus, the Tenth Circuit agreed with the Secretary of Labor that the Act treats an independent contractor, "unmoored from its common law meaning," in a manner calculated "to accomplish the remedial purposes of the statute." *Joy Technologies*, 99 F.3d at 996.

Pursuant to the Act's authorization, the Secretary of Labor has promulgated "mandatory health [and] safety standards" for the mining industry. *Id.* at § 811; *Bituminous Coal,* 547 F.2d at 242. The Secretary is also empowered to issue citations to mine operators who have violated the Mine Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to its authority, 30 U.S.C. § 814(a), or to assess civil penalties against any such operator. *Id.* at §§ 815, 820(a). Those mandatory safety standards are found at 30 C.F.R. Part 77. The Secretary's authority includes citations for failure to provide training pursuant to MSHA regulations. *See* 30 C.F.R. § 46.12.

As Congress understood, independent contractors are frequently employed by a mine's operator to assist with its operations, and "contractors' employees are frequently subjected to the same hazards as miners." *Bituminous Coal,* 547 F.2d at 243, 245. Thus, the Act plainly treats owner-operators of mines liable for the safety violations of independent contractors that it employs. *Speed Mining,* 528 F.3d at 314-15. Recently, the Fourth Circuit observed that "[p]recluding owner-operator liability for independent contractor violations would encourage owners to use contractors as a means of insulating themselves from safety regulations." *Id.* at 315. After all, owner-operators are "generally in continuous control of [mine] conditions" and are "more likely to know the federal safety and health requirements." *Cyprus Indus.,* 664 F.2d at 1119.

Significantly, explicit preemptive language is found in the Act, which states:

> No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, *except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.*

30 U.S.C. § 955(a) (emphasis added). The preemptive language goes on to state that "more stringent health and safety standards" may be imposed by the state and will not be regarded to be in conflict. 30 U.S.C. Sec. 955(b). Thus, the Mine Act makes clear that every state must at least require mines to meet the federal health and safety standards, even though the state may impose stricter standards.

Texas law,[2] insofar as it imposes no duty on the part of a mine's owner-operator to an independent contractor working at the mine, plainly conflicts with the Act and the mandatory safety standards promulgated pursuant to it.

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[2] This Court has found that state tort law operates as a "requirement" and thus is subject to the preemptive effects of contrary federal requirements. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (citation omitted). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (a liability award "can be, indeed is designed to be, a potent method of governing conduct and controlling policy.")

## I. The Court Should Grant Certiorari to Resolve a Conflict in State Courts of Last Resort on Whether the Mine Act Imposes a Standard of Care on Mine Operators for Independent Contractors Working at Their Mines

The Texas Court of Appeals utterly ignored any import that the Mine Act and its regulations have for the determination of whether Transit Mix owed any duty to Johnson.[3] It chose not to respond to Plaintiff's brief invoking the mandatory health and safety standards promulgated pursuant to the Act. In fact, no mention of the Act, its regulations, or the safety standards can be found in the court's opinion. Other state courts have recognized the Act's potential relevance but have split on whether federal law imposes a duty cognizable in a state tort action. While Indiana has held that the Act imposes no duty, courts in Montana and Pennsylvania have reached the opposite conclusion.

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[3] Just as a defendant has a Due Process right to raise "every available defense," *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (citation omitted), a plaintiff must have the corresponding right to raise every possible rationale to uphold a trial judgment. When the Texas Court of Appeals, and that state's Supreme Court, failed to address Johnson's legitimate federal duty argument, it not only frustrated the federal purpose, conflicted with the express preemption provision in the Mine Act, and denigrated Johnson's federal rights as established by the statutory scheme and its progeny, it may have also adversely affected Plaintiff's due-process rights by failing to provide a meaningful hearing of the claims at issue. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Only the Indiana Supreme Court has adopted an analysis consistent with the *result* in Texas. Still, in concluding that an owner-operator owes no duty of care to an independent contractor, Indiana, unlike the Texas court, found it necessary to examine the effect of the Mine Act. Nothing about Texas law excuses that state's courts from engaging in similar analysis. Like Texas and most other states, Indiana follows the "long-standing general rule" that "a principal is not liable for the negligence of an independent contractor." *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1143 (Ind. 2006). Like Texas, Indiana also recognizes an exception where the work is "intrinsically dangerous" or the principal is charged *by law* with performing a specific duty. *Compare id.* with *Loyd v. Herrington*, 182 S.W.2d 1003, 1004 (Tex. 1944) (inherently dangerous exception) and *Gulf, C. & S.F. Ry. Co. v. Flake*, 1882 WL 9032 (Tex. App. 1882) (statutory requirements impose nondelegable duty).

Even so, once it found the mining company owed no state-based common law duty to the independent contractor, the Indiana Supreme Court proceeded to examine whether the Mine Act's very existence changes that calculation. The court concluded that neither the Mine Act nor its regulations impose "a state law duty for purposes of tort liability of the owner for negligence of an independent contractor," relying on an analogy to the treatment of violations of the Occupational Safety and Health Administration (OSHA) regulations as not creating tort liability for independent contractors. *Vaughn*, 841 N.E.2d at 1144.[4]

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[4] Petitioner contends that no analogy should be drawn between OSHA violations and MSHA violations. The Occupational

Indiana's ruling stands in contradistinction with those of courts in Montana and Pennsylvania.[5] Despite following the same general rule as Texas and Indiana regarding the liability of principals, the Montana Supreme Court held that a mine's owner-operator "had a nondelegable duty to follow safety standards promulgated under the authority of the Mine Safety and Health Act, (MSHA), 30 U.S.C., § 801, and that violation of this standard was evidence of negligence." *Gibby v. Noranda Minerals Corp.*, 905 P.2d 126, 131 (Mont. 1995). It noted that the mine operator had a mandatory obligation to provide training to the independent contractor's employees under 30 C.F.R. §§ 48.5, 48.25. *Id.* at 131-132. The failure to discharge that obligation was a proximate cause of the injury that gave rise to the lawsuit.

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Health and Safety Act imposes a duty on employers *to protect the safety of its own employees*. 29 U.S.C. § 654(a)(1). The Mine Act, however, imposes a duty on the owner-operator of a mine to protect the safety of both its employees and those of independent contractors working at the mine site. 30 U.S.C § 802(g). The divergent language in the two statutes makes a critical difference that the Indiana court missed.

[5] The Wyoming Supreme Court appears to be the only other state court to have attempted to address this question. While finding it necessary to examine the Mine Act for purposes of determining whether there is a duty to an independent contractor, the Court found that even the broad definition of "miner" does not apply to an independent contractor injured during the course of a delivery to a mine site. *Burnett v. Imerys Marble, Inc.*, 116 P.3d 460 (Wyo. 2005). The decision did not address whether a covered independent contractor is owed a duty by virtue of the Mine Act, but the pains the court took to exclude the injured worker from the Act's coverage suggest that the court found substantial merit to the claim that the Mine Act creates a duty to eligible independent contractors.

A Pennsylvania trial court similarly held that the Mine Act imposes a nondelegable duty on mine owner-operators. The court reached that conclusion against the background of the same general rule that obtains in Texas that an owner owes no duty to employees of the independent contractor. *Lieberger v. Walter Co.*, 2005 WL 3784970, 74 Pa. D. & C.4th 270, 280-281 (Pa. Com. Pl. May 11, 2005), citing *Brletich v. U.S. Steel Corp.*, 285 A.2d 133, 136 (Pa. 1971).

Finding, however, that there was a particular risk of harm and that MSHA had issued a citation to the mine's owner-operator for "violation of at least one MSHA regulation," the Pennsylvania court held that "the MSHA regulations protect a defined group-people who work at mines," a group that includes independent contractors. *Id.* at 292-293. As a result, the defendant mine's motion for summary judgment on the plaintiff's claim of negligence per se and a co-defendant's demand for contribution were denied.

The Montana and Pennsylvania courts' conclusions that violation of the Mine Act and its regulations establish a duty and provide evidence of negligence makes great sense. Just as regulatory compliance is treated as evidence that a defendant did not breach a duty, the converse ought to be true: regulatory violations constitute evidence of a breach of duty. *See* Restatement (Third) of Torts: Prods. Liab. § 4 (1998) (adopting that approach to noncompliance and compliance with product safety statutes or regulations).

The conclusions of the Montana and Pennsylvania courts are also supported by the

express preemption provision of the Mine Act, which does not permit a State to impose a less stringent safety standard than those promulgated pursuant to the Act. Having defined work at a mine as inherently dangerous and imposing a statutory duty on the mine's owner-operator, Congress created a duty that no state can deny.

Because courts in different states have treated the mandate of the Mine Act and its regulations differently for purposes of state tort liability, a conflict exists that this Court should resolve.

## II. The Court Should Grant Certiorari to Resolve a Conflict between State Courts of Last Resort and the Federal Circuits on Whether the Mine Act Imposes a Standard of Care on Mine Operators for Independent Contractors Working at Their Mines

While the federal courts have not addressed an owner-operator's state tort liability for independent contractors working at mines, there is an abundance of cases where mine owner-operators have unsuccessfully argued against administrative liability for the acts of independent contractors. In fact, earlier this year, the Fourth Circuit observed that "an unbroken string of courts has found that an owner-operator and an independent contractor are 'jointly liable' for any Mine Act violations." *Speed Mining*, 528 F.3d at 316, citing *Twentymile Coal Co.*, 456 F.3d at 161; *United Mine Workers of America v. Fed. Mine Safety and Health Review Comm'n*, 840 F.2d 77, 82-83 (D.C. Cir. 1988); and *Cyprus Indus.*, 664 F.2d at 1118-19.

In an early leading case, *Bituminous Coal*, *supra*, the mine operator made an argument identical to that implicitly accepted by the Texas Court of Appeals below but rejected by the Fourth Circuit. The circuit court noted that the "mining companies take the position that construction companies are operators within the meaning of the Act, and furthermore that they are directly liable for the monetary consequences of their own violations." 547 F.2d at 246. In rejecting that assertion, as a rationale sufficient to absolve the mining company of any responsibility, the Fourth Circuit stated, "the Secretary can impose liability on a mining company for a construction company's violations" and that the law "impose[s] liability on the owner or lessee of a mine regardless of who violated the Act or created the danger." *Id.*

The Fourth Circuit concluded:

> The Act's broad definition of *agent* indicates that Congress did not intend to limit the vicarious liability of a [mine] owner or lessee to common law concepts of agency. Accordingly, we affirm the district court's ruling that operators may be held liable for construction company violations, because the construction companies are statutory agents of the owners and lessees of coal mines.

*Id.* at 247 (emphasis added). The court added that the Mine Act created a system of joint and several liability over violations of the act and its regulations. *Id. See also Cyprus Indus.*, 664 F.2d at 1118-19 (both

owner and independent contractor liable for safety violations by independent contractor).

More recently, the Fourth Circuit observed that the "text and purposes of the Mine Act, as well as uncontradicted precedent" makes the mine owner liable administratively for "any violations of the Mine Act committed by an independent contractor." *Speed Mining*, 528 F.3d at 314, citing *Cyprus Indus.*, 664 F.2d at 1119.

There is no justification for imposing differing standards for administrative and civil liability. Because no state can enforce a standard less than that promulgated pursuant to the Mine Act under its express preemption provision, state tort law cannot deny the existence of the federal duty. Because state courts have split on import and relevance of the Mine Act on this question while the federal circuit courts appear to be in complete harmony, a conflict exists that this Court should resolve.

## III. The Decision Below is Incorrect

The Texas Court of Appeals erred by failing to account for the import that the Mine Act has for any assessment of duty to workers at a mine. Congress has spoken clearly and unambiguously to the importance of mine safety and the owner-operator's responsibility for all workers on its property. *See Cyprus Indus.*, 664 F.2d at 1120 (citation omitted) (finding it difficult to see how miner safety is encouraged by allowing a mine owner to "'exonerate itself from its statutory responsibility for the safety and health or miners merely by establishing a private contractual relationship.'").

Under its authority pursuant to the Supremacy Clause, U.S. Const. art. VI, Congress prohibited any state from creating a less stringent duty than that imposed by the Mine Act or any order issued or any mandatory health or safety standard promulgated pursuant to the Act. 30 U.S.C. § 955. Because a state tort duty constitutes a "requirement" as much as any other exercise of state regulatory authority, *Riegel*, 128 S. Ct. at 1008, the Texas court's denial that the mine's owner-operator owed any duty to an independent contractor working at its mine creates a direct and patent conflict with federal law that cannot be upheld.

Moreover at a policy level, by its design and definitions, the Mine Act recognizes that a mine's owner-operator is the only party familiar with mandatory safety standards, who receives health and safety bulletins, and who can act in response to them. *See Cyprus Indus.*, 664 F.2d at 1119 (noting that owner-operators are "generally in continuous control of [mine] conditions" and thus "more likely to know the federal safety and health requirements."). The Mine Act thus imposes an obligation on the part of the owner-operator to provide hazard training to *both its own employees as well as those of its independent contractors. See* 30 C.F.R § 46.12; *see also Speed Mining*, 528 F.3d at 313; *Twentymile Coal Co.*, 456 F.3d at 161.

State law that undermines those nondelegable duties adversely affects that clear federal policy. Recognizing the strong and sensible connection between statutory and regulatory duties and tort liability, Section 424 of the Restatement (Second) of Torts states:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Moreover, the Restatement also recognizes that a general contractor may not transfer liability to independent contractors and disclaim responsibility for their negligent performance where the work to be conducted is necessarily ultrahazardous work. Restatement (Second) of Torts § 413. The Mine Act embodies the conclusion of Congress that work at mines constitutes ultrahazardous work. 30 U.S.C. § 801(b); *Bituminous Coal,* 547 F.2d at 245.

Texas law traditionally follows the Restatement in both respects. In *MBank El Paso, N.A. v. Sanchez,* 836 S.W.2d 151, 153 (Tex. 1992), the Texas Supreme Court cited Section 424 of the Restatement (Second), to conclude that a party bearing a duty imposed by statute "cannot escape it by delegating it to an independent contractor." Texas also imposes liability on the part of a principal for injuries to an independent contractor when the work involves inherently dangerous activities. *Id.*, citing Section 427 of Restatement (Second) of Torts, which the Texas Supreme Court noted had achieved "near-universal" acceptance.[6] *See Lee Lewis Constr., Inc. v. Harrison,* 70 S.W.3d 778, 794-95 & n.36 (Tex. 2001).

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[6] It has long been recognized that the general rule on principal liability to an independent contractor has three basic exceptions: (1) negligence in selecting, instructing, or

The court below, however, did not consider the application of either exception to the general rule governing duty *because* it chose to take no notice of the Mine Act and its meaning in this case. It did not have the authority to ignore federal law. This Court has observed that "[j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Felder v. Casey*, 487 U.S. 131, 151 (1988) (citations omitted).

Ignoring federal law to absolve a principal of liability amounts to a classic violation of preemption doctrine. By doing so, the state law "stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress" in enacting the Mine Act. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Texas Court of Appeals wrote the Mine Act, its regulations, orders, and safety standards and its assignment of responsibility for independent contractors out of the liability equation entirely. State courts are not authorized to disregard Federal law, and this Court should grant the petition to clarify that Federal law controls this question.

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supervising the contractor; (2) non-delegable duties arising out of some relation toward the public or by law; and (3) work which is specially, peculiarly, or inherently dangerous. *See Cooper v. U.S. Gov't and General Servs. Admin.*, 225 F. Supp. 2d 1, 5 (D.D.C. 2002), citing Restatement (Second) of Agency § 219 (1958).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

September 25, 2008

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# APPENDIX A

## OPINION OF THE TEXAS COURT OF APPEALS FOR THE 11TH DISTRICT (OCTOBER 12, 2006)

Court of Appeals of Texas, Eastland.
TRANSIT MIX CONCRETE & MATERIALS COMPANY and Trinity Materials, Inc., and Transit Mix and Materials Company, Appellants
v.
Darletta Rochelle JOHNSON, individually and as Representative of the Estate of Brad F. Johnson, Sr., Deceased, and as next friend of Brad Johnson, Jr., Jerelle Johnson, and Amethyst Johnson, Minors, Appellee.

No. 11-03-00300-CV.

Oct. 12, 2006.
Rehearing Overruled Dec. 6, 2006.

Background: Wife of deceased worker, individually and as representative of worker's estate, and as next friend of worker's three minor children, brought wrongful death action against sand and gravel mine company at whose site worker was injured. The 58th District Court, Jefferson County, James William Mehaffy, J., entered jury verdict in favor of worker's estate and survivors. Mine company appealed.

Holding: The Court of Appeals, Jim R. Wright, C.J., held that the mine company did not exercise control of worker so as to create a duty to worker.

Reversed and rendered.

OPINION

JIM R. WRIGHT, Chief Justice.

In 1999, Brad Johnson Sr. was killed while working at a sand and gravel mine owned and operated by Trinity Materials, Inc. and Transit Mix Concrete & Materials Company.[1] Darletta Rochelle Johnson, individually and as representative of the estate of her husband Brad F. Johnson Sr. and as next friend of the three minor children, Brad Johnson Jr., Jerelle Johnson, and Amethyst Johnson, filed suit against Trinity under the Wrongful Death Act, TEX. CIV. PRAC. & REM.CODE ANN. §§ 71.001-.012 (Vernon 1997 & Supp.2006), and the Texas Survival Statute, TEX. CIV. PRAC. & REM.CODE ANN. § 71.021 (Vernon 1997). The jury found Trinity negligent and awarded Johnson's estate and survivors $164 million in damages. In its final judgment, the trial court remitted the award to $27,357,090.83. We reverse and render.

Johnson was employed as a mechanic by RDO Equipment Company, a heavy equipment dealer. RDO performed repair work on heavy pieces of equipment for various companies. As part of the contract price, RDO provided an experienced

---

[1] The parties stipulated that Trinity Materials, Inc. and Transit Mix Concrete & Materials Company were the same entity for the purposes of this case. We will collectively refer to the appellants as "Trinity" as did each of the parties.

mechanic and equipped the mechanic with a field truck and necessary tools. RDO provided field services to numerous sand and gravel mines, and Johnson worked at several of those mines.

Trinity contracted with RDO to provide mechanical services, and RDO sent Johnson to perform the work. On the day of the accident, a Trinity employee assigned Johnson to repair the brakes on a Euclid B-30 dirt hauler. The B-30 had mud and sand around the tire and wheel assembly, and Johnson had difficulty removing it. Johnson consulted with Trinity employees on how to remove the tire, and the employees offered their suggestions. A Trinity employee tried to assist Johnson in removing the tire but returned to his assigned job when unable to remove the tire. Johnson said that he was going to use heat to break up the debris around the tire. Johnson used an acetylene torch with a rosebud attachment to apply heat to the debris. The tire exploded from the heat, and Johnson suffered multiple injuries resulting in his death.

[1] Trinity first argues that it owed no duty to Johnson, an independent contractor's employee. Negligence consists of three essential elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. Duty is the threshold inquiry. El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987); Howarton v. Minn. Mining and Mfg., Inc., 133 S.W.3d 820, 824 (Tex. App.-Eastland 2004, no pet.).

*95 [2][3][4] Ordinarily, a general contractor does not owe a duty to ensure that an independent contractor performs its work in a safe manner. Lee Lewis Const., Inc. v. Harrison, 70 S.W.3d 778, 783 (Tex.2001); Elliott-Williams Co. v. Diaz, 9 S.W.3d 801, 803 (Tex. 1999); Hoechst-Celanese Corp. v. Mendez, 967 S.W.2d 354, 356 (Tex. 1998). A duty does arise, however, if the general contractor retains some control over the manner in which the independent contractor performs its work. Lee Lewis, 70 S.W.3d at 783; Elliott-Williams, 9 S.W.3d at 803. A general contractor can retain the right to control an aspect of an independent contractor's work or project so as to give rise to a duty of care to that independent contractor's employees in two ways: by contract or by actual exercise of control. Lee Lewis, 70 S.W.3d at 783; Coastal Marine Serv. of Tex., Inc. v. Lawrence, 988 S.W.2d 223, 226 (Tex. 1999). The general contractor's duty of care is commensurate with the control it retains over the independent contractor's work. Lee Lewis 70 S.W.3d at 783; Hoechst-Celanese, 967 S.W.2d at 355.

[5] The parties do not contend that Trinity contracted the right to control Johnson's work. Therefore, the question before us is whether Trinity exercised actual control over Johnson's work. For a general contractor to be liable for its independent contractor's acts, it must have the right to control the means, methods, or details of the independent contractor's work. Elliott-Williams, 9 S.W.3d at 804; Coastal Marine, 988 S.W.2d at 226. The Restatement (Second) of Torts specifically outlines the degree of control necessary to create a duty:

[T]he employer must have retained at least some degree of control over the manner in which the work

is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

See RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965); Elliott-Williams, 9 S.W.3d at 804.

[6] Trinity assigned Johnson to repair the brakes on the B-30, but Trinity did not provide detailed instruction on the method or means of how to perform the job. See Hoechst-Celanese, 967 S.W.2d at 357. When Johnson had difficulty completing the assigned task, Trinity employees made suggestions and recommendations on how to perform the task. The Trinity employees whom Johnson consulted were not in a supervisory role over Johnson. Johnson alone made the decision to use the heat torch in effort to remove the tire.

[7][8] There was evidence presented that Trinity had the right to stop unsafe acts by independent contractors. Having the right to stop unsafe work is not enough to create a duty of care. Dow Chem. Co. v. Bright, 89 S.W.3d 602, 608 (Tex. 2002). A general contractor or an employer is not required to stand idly by while another is injured or killed in order to avoid liability. Id. However, if a general contractor

exercises control by requiring an independent contractor to comply with its safety regulations, the general contractor owes the independent contractor's employees a narrow duty of care that its safety requirements and procedures do not unreasonably increase the probability and severity of injury. Id. at 607. Trinity's*96 safety regulations did not increase the probability and severity of injury. Moreover, the jury charge did not include an issue on Trinity's safety regulations and there was no objection to the omission of that issue. See TEX. R. CIV. P. 274; see also State Dept. of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235 (Tex. 1992).

There is no evidence that Johnson was not free to perform "the work in his own way." See Section 414 cmt. c; Elliott-Williams, 9 S.W.3d at 804. There is no evidence that Trinity approved of Johnson's use of heat to remove the tire. Trinity assigned the task; Johnson ultimately made the decision to perform the task using heat to remove the tire. By assigning the task, offering suggestions on completing the task, and reserving the right to stop unsafe work practices, Trinity did not exercise control over Johnson's work so as to create a duty. Trinity's first issue on appeal is sustained. Because of our disposition of Trinity's first issue on appeal, we need not address Trinity's remaining issues. TEX. R. APP. P. 47.1.

The judgment of the trial court is reversed, and judgment is rendered that Darletta Rochelle Johnson, individually, as representative of the estate, and as next friend of the three minor children, take nothing from Trinity.

Transit Mix Concrete & Materials Co. v. Johnson, 205 S.W.3d 92. (Tex. App.-Eastland 2006).

## APPENDIX B

## JUDGMENT OF THE 58TH DISTRICT COURT, JEFFERSON COUNTY, TEXAS (JUNE 25, 2003)

CAUSE NO. A-164,606

IN THE DISTRICT COURT
JEFFERSON COUNTY, TEXAS
58TH JUDICIAL DISTRICT

DARLETA ROCHELLE JOHNSON, §
INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE
OF BRAD F. JOHNSON, SR, DECEASED,
AND AS NEXT FRIEND OF §
BRAD JOHNSON JR., JERELLE JOHNSON,
AND AMETHYST JOHNSON, MINORS

v.

TRINITY MATERIALS, INC., ET.AL.

### FINAL JUDGMENT

On the 26th day of March, 2003, came on to be heard the above-entitled and numbered cause, and Plaintiff Darleta Johnson, appeared Individually and by attorney of record, and as Next Friend of Brad Johnson, Jr., Jerelle Johnson, and Amethyst Johnson, Minor Children, and as Representative of the Estate of Brad Johnson, Sr. Deceased, and as Representative of the Lawful Heirs under the Texas Wrongful Death Act and Texas Survival Statute, and

announced ready for trial. Brian Sutton appointed by the Court on behalf of the minor Plaintiffs, appeared as Guardian Ad Litem, and Defendants, Trinity Materials, Inc., and Transmit Mix and Materials Company, appeared by attorney of record and announced ready for trial; and a jury having been previously demanded, consisting of twelve (12) qualified jurors, was duly emplaned; and the case proceeded to trial.

Before the court's Charge was submitted to the jury, Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company, made a written election to receive a dollar-for-dollar settlement credit, pursuant to Tex. Civ. Prac. & Rem. Code § 33.014, for the $400,500.00 settlement payment made by Bridgestone/Firestone North American Tire, LLC, to Plaintiffs in this lawsuit.

At the conclusion of the evidence, the court submitted the questions of fact in the case to the jury. After deliberation, the jury returned and announced its verdict in open court, which verdict was unanimous and was duly received and filed by this court. As part of its verdict, the jury found that:

> (1) Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company, exercised control of the work activity that caused the death of Brad Johnson, Sr.
>
> (2) The negligence of Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company, proximately caused the occurrence in question.

(3) Responsibility for the harm for which recovery was sought was attributed 100% to the Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company.

(4) The Plaintiff, Darleta Rochelle Johnson, individually, sustained damages for pecuniary loss, loss of companionship and society, and mental anguish in the past in the amount of $3,300,000.00; and she, in reasonable probability, will sustain a loss in the future of $36,500,000.00.

(5) The minor Plaintiff, Brad Johnson, Jr., sustained damages for pecuniary loss, loss of companionship and society, and mental anguish in the past in the amount of $3,300,000.00; and he, in reasonable probability, will sustain a loss in the future of $28,100,000.00.

(6) The minor Plaintiff, Jerelle Johnson, sustained damages for pecuniary loss, loss of companionship and society, and mental anguish in the past in the amount of $3,300,000.00; and he, in reasonable probability, will sustain a loss in the future of $56,200,000.00.

(7) The minor Plaintiff, Amethyst Johnson, sustained damages for pecuniary loss, loss of companionship and society, and mental anguish in the past in the amount of $3,300,000.00; and she, in reasonable

probability, will sustain a loss in the future of $28,100,000.00.

(8) The deceased Plaintiff, Brad Johnson, Sr. sustained damages for:

(a) pain and mental anguish before his death in the amount of $1,600,000.00;
(b) medical expenses for treatment of his injuries in the amount of $112,685.83; and
(c) funeral and burial expenses reasonably suited to his station in life of $10,000.00.

The court finds that the parties stipulated during the trial of the case that the deceased Plaintiffs medical, funeral and burial expenses amount to $119,590.83. Accordingly, the Plaintiffs have agreed to voluntarily remit the amount of $3,905.00 from the award to Brad Johnson, Sr. The court finds that prejudgment interest has accrued on Plaintiffs' claim for actual damages. The prejudgment interest is calculated as simple interest at the rate of ten (10%) percent. Prejudgment interest as allowable by law began on February 16, 2001 (the day suit was filed), and ends on the day before the final judgment is signed.

The court further finds that the deceased Plaintiff, Brad Johnson, Sr., was injured on February 17, 1999, while in the course and scope of his employment. The parties stipulated that his employer's worker's compensation carrier, Sentry Select Insurance Company, who is not a party to this lawsuit, has expended $164,084.83 in medical and indemnity benefits on his behalf to the date of the judgment, and, thus, Sentry Select Insurance

Company is entitled, and will continue to be entitled to subrogation of those amounts until paid in full, or in an amount to the satisfaction of Sentry Select Insurance Company and Plaintiffs as follows: a) all medical and funeral benefits paid by Sentry Select Insurance Company shall be satisfied out of the award to Darleta Johnson, as representative of the estate of Brad Johnson, Sr.; b) all indemnity benefits paid by Sentry Select Insurance Company to Darleta Johnson shall be satisfied out of the award to Darleta Johnson; and c) all indemnity benefits paid by Sentry Select Insurance Company to Brad Johnson, Jr.; Jerelle Johnson; and Amethyst Johnson shall be satisfied as having been received by each child, out of the award to each said child.

The court finds that Brad Johnson, Jr., Jerelle Johnson and Amethyst Johnson, the persons designated in the trial pleadings as minor Plaintiffs, are in truth and in fact minors under the age of eighteen (18) years whose disabilities of minority have never been removed, and there are no lawful guardians of the persons and/or the estates of said minor Plaintiffs, but further finding that a conflict existed between the minors and the next friend before the court appointed Brian Sutton as guardian ad litem of the minor children in this lawsuit. Prior to the entry of judgment, the court heard evidence on the guardian ad litem fees for Brian Sutton. Accordingly, the court finds that Brian Sutton, Guardian Ad Litem appointed by the court for the minor Plaintiffs, is a fit and proper person to serve in the capacity of Guardian Ad Litem to represent the interests of the minors. The court further finds that no conflict of interest exists between the minor

Plaintiffs and their Guardian Ad Litem, Brian Sutton. Having heard the evidence, including the extraordinary circumstances of the minor Plaintiff, Jerelle Johnson, an autistic child, the court further finds that Brian Sutton has acquainted himself with the facts and the laws of the case, so that after the time and labor involved, and the results obtained, the nature and length of his professional relationship with the minor Plaintiffs, the fee customarily charged in this locality for similar legal services, the time limitations imposed on him by the circumstances, including much study and deliberation, and his participation in the trial, as well as at numerous mediations before trial, during trial and post verdict, that $120,000,00 is a fair and reasonable charge for the services rendered by him as the Guardian Ad Litem for said minor Plaintiffs under the appointment of this court

The court further finds that should a notice of appeal be filed by any party then a further fair and reasonable sum for the services rendered by Brian Sutton as the Guardian Ad Litem for said minor Plaintiffs under the appointment of this court during the pendency of the appeal at the court of appeals is $10,000.00.

The court further finds that should a petition for review be filed by any party with the Supreme Court of the State of Texas, then a further fair and reasonable sum for the services rendered by Brian Sutton as the Guardian Ad Litem for said minor Plaintiffs under the appointment of this court during the pendency of the appeal at the Supreme Court of the State of Texas is $10,000.00.

ACCORDINGLY, because it appears to the Court that the verdict of the jury was for Plaintiffs and against Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company, judgment should be rendered in favor of Plaintiffs and against Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company, and the court having considered sua sponte the evidence and the excessiveness of the jury verdict as to actual damages, and hereby deciding to remit those actual damages to those amounts as awarded below,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, by the court that Plaintiffs, Darleta Johnson, Individually, and as Next Friend of Brad Johnson, Jr., Jerelle Johnson, and Amethyst Johnson, Minor Children, and as Representative of the Estate of Brad Johnson, Sr., Deceased, and as Representative of the Lawful Heirs under the Texas Wrongful Death Act and Texas Survival Statute, shall recover from Defendants, Trinity Materials, Inc., and Transmit Mix and Materials Company, as follows:

(1) That Darleta Johnson, individually, shall recover from the Defendants, Trinity Materials, Inc., and Transmit Mix and Materials Company, the sum of $6,765,000.00, less a settlement credit of $178,000.00, plus prejudgment interest in the amount of $1 ,550,200.82, accrued and calculated as simple interest at the rate of ten (10%) percent beginning on February 16, 2001 (the day suit was filed), and ending on the day before the final judgment is signed (June 24,

2003); plus post judgment interest on the total amount of the judgment at the rate of 10% interest per year, compounded annually, from the day the judgment is signed (June 25, 2003) until the day the judgment is satisfied;

(2) That Darleta Johnson, as representative of the Estate of Brad Johnson, Sr., Deceased, and as Representative of the Lawful Heirs under the Texas Wrongful Death Act and Texas Survival Statute, shall recover from the Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company the sum of $294,590.83, plus prejudgment interest in the amount $69,329.73, accrued and calculated as simple interest at the rate of ten (10%) percent beginning on February 16,2001 (the day suit was filed), and ending on the day before the final judgment is signed (June 24, 2003); plus post judgment interest on the total amount of the judgment at the rate of 10% interest per year, compounded annually, from the day the judgment is signed (June 25, 2003) until the day the judgment is satisfied;

(3) That Brad Johnson, Jr., minor plaintiff, shall recover from the Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company the sum $5,350,000.00, less a settlement credit of $74,166.66, plus prejudgment interest in the amount of $1,241,627.63, accrued and calculated as simple interest at the rate of ten (10%) percent beginning on February 16, 200 I (the day suit was filed), and ending on the day before the final judgment is signed (June 24, 2003); plus post judgment interest on the total

amount of the judgment at the rate of 10% interest per year, compounded annually, from the day the judgment is signed (June 25, 2003) until the day the judgment is satisfied;

(4) That Jerelle Johnson, minor plaintiff, shall recover from the Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company the sum $10,000,000.00, less a settlement credit of $74,166.68, plus prejudgment interest in the amount of $2,335,970.09, accrued and calculated as simple interest at the rate of ten (10%) percent beginning on February 16, 2001 (the day suit was filed), and ending on the day before the final judgment is signed (June 24, 2003); plus post judgment interest on the total amount of the judgment at the rate of 10% interest per year, compounded annually, from the day the judgment is signed (June 25, 2003) until the day the judgment is satisfied;

(5) That Amethyst Johnson, minor plaintiff, shall recover from the Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company the sum $5,350,000.00, less a settlement credit of $74,166.66, plus prejudgment interest in the amount of $1,241,627.63, accrued and calculated as simple interest at the rate of ten (10%) percent beginning on February 16, 2001 (the day suit was filed), and ending on the day before the final judgment is signed (June 24, 2003); plus post judgment interest on the total amount of the judgment at the rate of 10%

interest per year, compounded annually, from the day the judgment is signed (June 25, 2003) until the day the judgment is satisfied; and

(6) That Plaintiffs, collectively, recover of and from the Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company as actual damages as more specifically set out in items (1) through (5) above, the total sum of $27,357,090.83, together with prejudgment interest in the total amount of $6,438,755.90, accrued and calculated as simple interest at the rate of ten (10%) percent beginning on February 16, 2001 (the day suit was filed), and ending on the day before the final judgment is signed (June 24, 2003), for a total judgment against Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company, in the sum of $33,797,846.73; which sum shall bear interest at the rate of 10% interest per year, compounded annually, from the day the judgment is signed (June 25, 2003) until the day the judgment is satisfied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that Plaintiffs, Darleta Johnson, Individually, and as Next Friend of Brad Johnson, Jr., Jerelle Johnson, and Amethyst Johnson, Minor Children, and as Representative of the Estate of Brad Johnson, Sr., Deceased, and as Representative of the Lawful Heirs under the Texas Wrongful Death Act and Texas Survival Statute, have and recover from Defendants, Trinity Materials, Inc., and Transit Mix and Materials

Company, all costs of court expended or incurred in this cause by Plaintiffs, including all mediator fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a reasonable fee in the amount of $120,000.00 shall be paid to Brian Sutton, Guardian Ad Litem, which fee is a fair and reasonable charge for his services rendered under the appointment of this court and on behalf of the minor Plaintiffs, Brad Johnson, Jr., Jerelle Johnson and Amethyst Johnson, and said fee is hereby taxed against Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a further reasonable fee in the amount of $10,000.00 shall be paid to Brian Sutton, Guardian Ad Litem, which further sum is a fair and reasonable charge for his services rendered under the appointment of this court and on behalf of the minor Plaintiffs, Brad Johnson, Jr., Jerelle Johnson and Amethyst Johnson, should a notice of appeal be filed by any party, and said further fee is hereby taxed against Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company.

IT IS FURTHER ORDERED that a further reasonable fee in the amount of $10,000.00 shall be paid to Brian Sutton, Guardian Ad Litem, which further sum is a fair and reasonable charge for his services rendered under the appointment of this court and on behalf of the minor Plaintiffs, Brad Johnson, Jr Jerelle Johnson and Amethyst Johnson, should a petition for review be filed by any party with the Supreme Court of the State of Texas, and

said further fee is hereby taxed against Defendants, Trinity Materials, Inc., and Transit Mix and Materials Company.

IT IS FURTHER ORDERED by the court that Plaintiffs are granted all writs, processes, proceedings, actions and remedies necessary for the enforcement and collection of this judgment or the costs of court and same may issue as necessary for the benefit of Plaintiffs, and against Defendants, Trinity Materials, Inc., .and Transit Mix and Materials Company,

The Charge of the court, including the jury questions, definitions and instructions; the verdict of the jury; the stipulations entered into by the parties; and Defendants', Trinity Materials, Inc., and Transit Mix and Materials Company, settlement credit election and the amounts allocated from that settlement to the Plaintiffs in this lawsuit,. are incorporated in this judgment for all purposes by reference.

All other relief not expressly granted is denied,

SIGNED THIS 25th day of June, 2003.

JUDGE PRESIDING

# APPENDIX C

## ORDER OF THE TEXAS SUPREME COURT, DENYING REVIEW (FEBRUARY 22, 2008)

THE SUPREME COURT OF TEXAS

Orders Pronounced February 22, 2008

ORDERS ON PETITIONS FOR REVIEW
THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0063 DARLETA ROCHELLE JOHNSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BRAD F. JOHNSON, SR., DECEASED, AND AS NEXT FRIEND OF BRAD JOHNSON, JR., JERELLE JOHNSON AND AMETHYST JOHNSON, MINORS v. TRANSIT MIX CONCRETE & MATERIALS COMPANY AND TRINITY MATERIALS, INC.; from Jefferson County; 11th district (11-03-00300-CV, ___ SW3d ___,10-12-06).

# APPENDIX D

## ORDER OF THE TEXAS SUPREME COURT, DENYING RE-HEARING OF PETITION (JUNE 27, 2008)

THE SUPREME COURT OF TEXAS

Orders Pronounced June 27, 2008

ORDERS ON CAUSES

ORDERS ON MOTIONS FOR REHEARING
THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0063 DARLETA ROCHELLE JOHNSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BRAD F. JOHNSON, SR., DECEASED, AND AS NEXT FRIEND OF BRAD JOHNSON, JR., JERELLE JOHNSON AND AMETHYST JOHNSON, MINORS v. TRANSIT MIX CONCRETE & MATERIALS COMPANY AND TRINITY MATERIALS, INC.; from Jefferson County; 11th district (11-03-00300-CV, ___ SW3d ___, 10-12-06).

# APPENDIX E

## U.S. CONST. ART VI

United States Code

Constitution of the United States

Article VI. Debts Validated--Supreme Law of Land--Oath of Office

### Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

# APPENDIX F

## 29 U.S.C. § 654(a)(1)

United States Code Annotated
Title 29. Labor
Chapter 15. Occupational Safety and Health

### § 654. Duties of employers and employees

(a) Each employer--

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

# APPENDIX G

## 30 U.S.C. § 801

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health

### § 801. Congressional findings and declaration of purpose

Congress declares that--

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

# APPENDIX H

## 30 U.S.C. § 802

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health

### § 802. Definitions

For the purpose of this chapter, the term--

(a) "Secretary" means the Secretary of Labor or his delegate;

(b) "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof;

(c) "State" includes a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands;

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

(e) "agent" means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine;

(f) "person" means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization;

(g) "miner" means any individual working in a coal or other mine;

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of subchapters II, III, and IV of this chapter, "coal mine" means an area of land and

all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

(i) "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine;

(j) "imminent danger" means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated;

(k) "accident" includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person;

(l) "mandatory health or safety standard" means the interim mandatory health or safety standards established by subchapters II and III of this chapter, and the standards promulgated pursuant to subchapter I of this chapter;
(m) "Panel" means the Interim Compliance Panel established by this chapter; and

(n) "Administration" means the Mine Safety and Health Administration in the Department of Labor.

(o) "Commission" means the Federal Mine Safety and Health Review Commission.

# APPENDIX I

## 30 U.S.C. § 811

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health
Subchapter I. General

### § 811. Mandatory safety and health standards

(a) Development, promulgation, and revision

The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request

the recommendation of an advisory committee appointed under section 812(c) of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within 60 days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than 180 days. When the Secretary receives a recommendation, accompanied by appropriate criteria, from the National Institute for Occupational Safety and Health that a rule be promulgated, modified, or revoked, the Secretary must, within 60 days after receipt thereof, refer such recommendation to an advisory committee pursuant to this paragraph, or publish such as a proposed rule pursuant to paragraph (2), or publish in the Federal Register his determination not to do so, and his reasons therefor. The Secretary shall be required to request the recommendations of an advisory committee appointed under section 812(c) of this title if the rule to be promulgated is, in the discretion of the Secretary which shall be final, new in effect or application and has significant economic impact.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking a mandatory health or safety standard in the Federal Register. If the Secretary determines that a rule should be proposed and in connection therewith has appointed

an advisory committee as provided by paragraph (1), the Secretary shall publish a proposed rule, or the reasons for his determination not to publish such rule, within 60 days following the submission of the advisory committee's recommendation or the expiration of the period of time prescribed by the Secretary in such submission. In either event, the Secretary shall afford interested persons a period of 30 days after any such publication to submit written data or comments on the proposed rule. Such comment period may be extended by the Secretary upon a finding of good cause, which the Secretary shall publish in the Federal Register. Publication shall include the text of such rules proposed in their entirety, a comparative text of the proposed changes in existing rules, and shall include a comprehensive index to the rules, cross-referenced by subject matter.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed mandatory health or safety standard, stating the grounds therefor and requesting a public hearing on such objections. Within 60 days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the mandatory health or safety standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing. Any hearing under this subsection for the purpose of hearing relevant information shall commence within 60 days after the date of publication of the notice of hearing. Hearings required by this subsection shall

be conducted by the Secretary, who may prescribe rules and make rulings concerning procedures in such hearings to avoid unnecessary cost or delay. Subject to the need to avoid undue delay, the Secretary shall provide for procedures that will afford interested parties the right to participate in the hearing, including the right to present oral statements and to offer written comments and data. The Secretary may require by subpoena the attendance of witnesses and the production of evidence in connection with any proceeding initiated under this section. If a person refuses to obey a subpoena under this subsection, a United States district court within the jurisdiction of which a proceeding under this subsection is conducted may, upon petition by the Secretary, issue an order requiring compliance with such subpoena. A transcript shall be taken of any such hearing and shall be available to the public.

(4) (A) Within 90 days after certification of the record of the hearing held pursuant to paragraph (3), the Secretary shall by rule promulgate, modify, or revoke such mandatory health or safety standards, and publish his reasons therefor.

(B) In the case of a proposed mandatory health or safety standard to which objections requesting a public hearing have not been filed, the Secretary, within 90 days after the period for filing such objections has expired, shall by rule promulgate, modify, or revoke such mandatory standards, and publish his reasons therefor.

(C) In the event the Secretary determines that a proposed mandatory health or safety standard should not be promulgated he shall, within the times

specified in subparagraphs (A) and (B) publish his reasons for his determination.

(5) Any mandatory health or safety standard promulgated as a final rule under this section shall be effective upon publication in the Federal Register unless the Secretary specifies a later date.

(6) (A) The Secretary, in promulgating mandatory standards dealing with toxic materials or harmful physical agents under this subsection, shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life. Development of mandatory standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the miner, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the mandatory health or safety standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(B) The Secretary of Health and Human Services, as soon as possible after November 9, 1977, but in no event later than 18 months after such date and on a continuing basis thereafter, shall, for each toxic material or harmful physical agent which is

used or found in a mine, determine whether such material or agent is potentially toxic at the concentrations in which it is used or found in a mine. The Secretary of Health and Human Services shall submit such determinations with respect to such toxic substances or harmful physical agents to the Secretary. Thereafter, the Secretary of Health and Human Services shall submit to the Secretary all pertinent criteria regarding any such substances determined to be toxic or any such harmful agents as such criteria are developed. Within 60 days after receiving any criteria in accordance with the preceding sentence relating to a toxic material or harmful physical agent which is not adequately covered by a mandatory health or safety standard promulgated under this section, the Secretary shall either appoint an advisory committee to make recommendations with respect to a mandatory health or safety standard covering such material or agent in accordance with paragraph (1), or publish a proposed rule promulgating such a mandatory health or safety standard in accordance with paragraph (2), or shall publish his determination not to do so.

(7) Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such mandatory standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring miner exposure at such locations and

intervals, and in such manner so as to assure the maximum protection of miners. In addition, where appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of examinations or tests made pursuant to the preceding sentence shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the miner, to his designated physician.

(8) The Secretary shall, to the extent practicable, promulgate separate mandatory health or safety standards applicable to mine construction activity on the surface.

(9) No mandatory health or safety standard promulgated under this subchapter shall reduce the protection afforded miners by an existing mandatory health or safety standard.

(b) Emergency temporary mandatory standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5 for an emergency temporary mandatory health or safety standard to take immediate effect upon publication in the Federal Register if he determines (A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger.

(2) A temporary mandatory health or safety standard shall be effective until superseded by a mandatory standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register, the Secretary shall commence a proceeding in accordance with subsection (a) of this section, and the standards as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a mandatory health or safety standard under this paragraph no later than

nine months after publication of the emergency temporary standard as provided in paragraph (2).

(c) Modification of standards

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall

be of record and shall be subject to section 554 of Title 5.

(d) Judicial review

Any person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after such standard is promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused for good cause shown. The validity of any mandatory health or safety standard shall not be subject to challenge on the grounds that any of the time limitations in this section have been exceeded. The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard.

(e) Distribution of copies of proposed standards or regulations

The Secretary shall send a copy of every proposed mandatory health or safety standard or regulation at the time of publication in the Federal Register to the operator of each coal or other mine and the representative of the miners at such mine and such

copy shall be immediately posted on the bulletin board of the mine by the operator or his agent, but failure to receive such notice shall not relieve anyone of the obligation to comply with such standard or regulation.

# APPENDIX J

## 30 U.S.C. § 814(a)

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health
Subchapter I. General

### § 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

# APPENDIX K

## 30 U.S.C. § 815

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health
Subchapter I. General

### § 815. Procedure for enforcement

(a) Notification of civil penalty; contest

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 820(a) of this title for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by

the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

(b) Failure of operator to correct violation; notification; contest; temporary relief

(1)(A) If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees. If, within 30 days from the receipt of notification of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the notification of proposed assessment of penalty, such notification shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a notification of proposed assessment of penalty issued under this subsection shall constitute receipt thereof within the meaning of this subsection.

(B) In determining whether to propose a penalty to be assessed under section 820(b) of this title, the Secretary shall consider the operator's history of previous violations, the appropriateness of

such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 814 of this title together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if--

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 814 of this title. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

(c) Discrimination or interference prohibited; complaint; investigation; determination; hearing

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the

complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his [FN1] paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. Violations by any person of

paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title.

(d) Contest proceedings; hearing; findings of fact; affirmance, modification, or vacatur of citation, order, or proposed penalty; procedure before Commission

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this title, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this title, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this title, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this title, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected

miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 814 of this title.

# APPENDIX L

## 30 U.S.C. § 820(a)

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health
Subchapter I. General

### § 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

(1) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(2) The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 813(j) of this title (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000.

(3) (A) The minimum penalty for any citation or order issued under section 814 (d)(1) of this title shall be $2,000.

(B) The minimum penalty for any order issued under section 814(d)(2) of this title shall be $4,000.

(4) Nothing in this subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 816 of this title, of an order imposing a penalty described in this subsection. If a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection.

# APPENDIX M

## 30 U.S.C. § 955

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 22. Mine Safety and Health
Subchapter V. Administrative Provisions

### § 955. State laws

(a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter. The provisions of any State law or regulation in effect on December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory

health or safety standard, shall not be held to be in conflict with this chapter.

# APPENDIX N

## 30 C.F.R. § 46.12

Code of Federal Regulations Currentness
Title 30. Mineral Resources

Chapter I. Mine Safety and Health Administration, Department of Labor

Subchapter H. Education and Training

Part 46. Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines

### § 46.12 Responsibility for independent contractor training.

(a)(1) Each production-operator has primary responsibility for ensuring that site-specific hazard awareness training is given to employees of independent contractors who are required to receive such training under § 46.11 of this part.

(2) Each production-operator must provide information to each independent contractor who employs a person at the mine on site-specific mine hazards and the obligation of the contractor to comply with our regulations, including the requirements of this part.

(b) (1) Each independent contractor who employs a miner, as defined in § 46.2, at the mine has primary responsibility for complying with §§ 46.3 through 46.10 of this part, including providing new miner training, newly hired experienced miner training, new task training, and annual refresher training.

(2) The independent contractor must inform the production-operator of any hazards of which the contractor is aware that may be created by the performance of the contractor's work at the mine.

# APPENDIX O

## 30 C.F.R. § 48.5

Code of Federal Regulations

Title 30. Mineral Resources

Chapter I. Mine Safety and Health Administration, Department of Labor

Subchapter H. Education and Training

Part 48. Training and Retraining of Miners
Subpart A. Training and Retraining of Underground Miners

### § 48.5 Training of new miners; minimum courses of instruction; hours of instruction.

(a) Each new miner shall receive no less than 40 hours of training as prescribed in this section before such miner is assigned to work duties. Such training shall be conducted in conditions which as closely as practicable duplicate actual underground conditions, and approximately 8 hours of training shall be given at the minesite.

(b) The training program for new miners shall include the following courses:

(1) Instruction in the statutory rights of miners and their representatives under the Act; authority and responsibility of supervisors. The course shall

include instruction in the statutory rights of miners and their representatives under the Act, including a discussion of section 2 of the Act; a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

(2) Self-rescue and respiratory devices. The course shall be given before a new miner goes underground and shall include--

(i) Instruction and demonstration in the use, care, and maintenance of self-rescue and respiratory devices used at the mine;

(ii) Hands-on training in the complete donning of all types of self-contained self-rescue devices used at the mine, which includes assuming a donning position, opening the device, activating the device, inserting the mouthpiece, and putting on the nose clip; and

(iii) Hands-on training in transferring between all applicable self-rescue devices.

(3) Entering and leaving the mine; transportation; communications. The course shall include instruction on the procedures in effect for entering and leaving the mine; the check-in and checkout system in effect at the mine; the procedures for riding on and in mine conveyances; the controls in effect for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

(4) Introduction to the work environment. The course shall include a visit and tour of the mine, or portions of the mine which are representative of the entire mine. A method of mining utilized at the mine shall be observed and explained.

(5) Mine map; escapeways; emergency evacuation; barricading. The program of instruction for mine emergency evacuation and firefighting approved by the District Manager under 30 CFR 75.1502 or the escape and evacuation plan under 30 CFR 57.11053, as applicable, shall be used for this course. The course shall include--

(i) A review of the mine map; the escapeway system; the escape, firefighting, and emergency evacuation plans in effect at the mine; and the location of abandoned areas; and

(ii) An introduction to the methods of barricading and the locations of the barricading materials, where applicable.

(6) Roof or ground control and ventilation plans. The course shall include an introduction to and instruction on the roof or ground control plan in effect at the mine and procedures for roof and rib or ground control; and an introduction to and instruction on the ventilation plan in effect at the mine and the procedures for maintaining and controlling ventilation.

(7) Health. The course shall include instruction on the purpose of taking dust, noise, and other health measurements, and any health control plan in effect

at the mine shall be explained. The health provisions of the act and warning labels shall also be explained.

(8) Cleanup; rock dusting. The course shall include instruction on the purpose of rock dusting and the cleanup and rock dusting program in effect at the mine, where applicable.

(9) Hazard recognition. The course shall include the recognition and avoidance of hazards present in the mine, particularly any hazards related to explosives where explosives are used or stored at the mine.

(10) Electrical hazards. The course shall include recognition and avoidance of electrical hazards.

(11) First aid. The course shall include instruction in first aid methods acceptable to MSHA.

(12) Mine gases. The course shall include instruction in the detection and avoidance of hazards associated with mine gases.

(13) Health and safety aspects of the tasks to which the new miner will be assigned. The course shall include instruction in the health and safety aspects of the tasks to be assigned, including the safe work procedures of such tasks, the mandatory health and safety standards pertinent to such tasks, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program.

(14) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

(c) Methods, including oral, written, or practical demonstration, to determine successful completion of the training shall be included in the training plan. The methods for determining such completion shall be administered to the miner before he is assigned work duties.

(d) A newly employed miner who has less than 12 months of mining experience and has received the courses and hours of instruction in paragraphs (a) and (b) of this section, within 36 months preceding employment at a mine, does not have to repeat this training. Before the miner starts work, the operator must provide the miner with the experienced miner training in § 48.6(b) of this part and, if applicable, the new task training in § 48.7 of this part. The operator must also provide the miner with annual refresher training and additional new task training, as applicable.

# APPENDIX P

## 30 CFR § 48.25

Code of Federal Regulations

Title 30. Mineral Resources

Chapter I. Mine Safety and Health Administration, Department of Labor

Subchapter H. Education and Training

Part 48. Training and Retraining of Miners
Subpart B. Training and Retraining of Miners Working at Surface Mines and Surface Areas of Underground Mines

### § 48.25 Training of new miners; minimum courses of instruction; hours of instruction.

(a) Each new miner shall receive no less than 24 hours of training as prescribed in this section. Except as otherwise provided in this paragraph, new miners shall receive this training before they are assigned to work duties. At the discretion of the District Manager, new miners may receive a portion of this training after assignment to work duties: Provided, That no less than 8 hours of training shall in all cases be given to new miners before they are assigned to work duties. The following courses shall be included in the 8 hours of training: Introduction to work environment, hazard recognition, and health and safety aspects of the tasks to which the new miners will be assigned. Following the completion of this preassignment training, new miners shall then

receive the remainder of the required 24 hours of training, or up to 16 hours, within 60 days. Operators shall indicate in the training plans submitted for approval whether they want to train new miners after assignment to duties and for how many hours. In determining whether new miners may be given this training after they are assigned duties, the District Manager shall consider such factors as the mine safety record, rate of employee turnover and mine size. Miners who have not received the full 24 hours of new miner training shall be required to work under the close supervision of an experienced miner.

(b) The training program for new miners shall include the following courses:

(1) Instruction in the statutory rights of miners and their representatives under the Act; authority and responsibility of supervisors. The course shall include instruction in the statutory rights of miners and their representatives under the Act, including a discussion of section 2 of the Act; a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

(2) Self-rescue and respiratory devices. The course shall include instruction and demonstration in the use, care, and maintenance of self-rescue and respiratory devices, where applicable.

(3) Transportation controls and communication systems. The course shall include instruction on the procedures in effect for riding on and in mine conveyances where applicable; the controls for the transportation of miners and materials; and the use of mine communication systems, warning signals, and directional signs.

(4) Introduction to work environment. The course shall include a visit and tour of the mine, or portions of the mine which are representative of the entire mine. The method of mining or operation utilized shall be observed and explained.

(5) Escape and emergency evacuation plans; firewarning and firefighting. The course shall include a review of the mine escape system, and escape and emergency evacuation plans in effect at the mine; and instruction in the firewarning signals and firefighting procedures.

(6) Ground control; working in areas of highwalls, water hazards, pits and spoil banks; illumination and night work. The course shall include, where applicable, and introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits and spoil banks; the illumination of work areas; and safe work procedures during the hours of darkness.

(7) Health. The course shall include instruction on the purpose of taking dust measurements, where applicable, and noise and other health measurements, and any health control plan in effect at the mine shall be explained. The health provisions of the Act and warning labels shall also be explained.

(8) Hazard recognition. The course shall include the recognition and avoidance of hazards present in the mine.

(9) Electrical hazards. The course shall include recognition and avoidance of electrical hazards.

(10) First aid. The course shall include instruction in first aid methods acceptable to MSHA.

(11) Explosives. The course shall include a review and instruction on the hazards related to explosives. The only exception to this course component is when no explosives are used or stored on mine property.

(12) Health and safety aspects of the tasks to which the new miner will be assigned. The course shall include instructions in the health and safety aspects of the tasks to be assigned, including the safe work procedures of such tasks, the mandatory health and safety standards pertinent to such tasks, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program.

(13) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

(c) Methods, including oral, written or practical demonstration, to determine successful completion of the training shall be included in the training plan. Upon completion of training, the methods for

determining successful completion shall be administered to the miner. The method for determining successful completion of pre-assignment training under paragraph (a) of this section shall be administered to the miner before he is assigned to work duties.

(d) A newly employed miner who has less than 12 months of mining experience and has received the courses and hours of instruction in paragraphs (a) and (b) of this section, within 36 months preceding employment at a mine, does not have to repeat this training. Before the miner starts work, the operator must provide the miner with the experienced miner training in § 48.26(b) of this part and, if applicable, the new task training in § 48.27 of this part. The operator must also provide the miner with annual refresher training and additional new task training, as applicable.

# APPENDIX Q

## U.S. DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, METAL / NONMETAL FATALITY FATALGRAM (FEBRUARY 17, 1999)

U.S. Department of Labor
Mine Safety and Health Administration
Protecting Miners' Safety and Health Since 1978

**METAL/NONMETAL MINE FATALITY** - On February 17, 1999, a 35-year-old technician (contractor operator) with 10 years experience was fatally injured at a sand and gravel operation. The victim used a fork lift attached to a chain while attempting to remove a wheel assembly from a dump trailer in preparation to repair the brakes. After these attempts failed to free the wheel, he applied heat to the back side of the wheel with an oxygen/acetylene torch and the tire ruptured.

### Best Practices

Never apply a heat source to a tire rim/hub until the tire has been removed from the rim/hub assembly.

The manufacturer's guidelines for wheel removal should be consulted and followed.

Tire and rim safety training should be provided to maintenance personnel who are required to service tires and rims.

MSHA Publication IG 60, "Tire and Rim Safety Awareness Program" is available from the National Mine Health & Safety Academy or on the Internet at http:// www. msha. gov/sc: hinfo/IG60.PDF. The file is in PDF.

This is the tenth fatality reported in calendar year 1999 in the metal and nonmetal mining industries. As of this date in 1998, there were eight fatalities reported in these industries. This is the first fatality classified as Exploding Vessels Under Pressure in 1999. There were no Exploding Vessels Under Pressure fatalities in the same period in 1998.

http://www.msha.gov/FATALS/1999/FAB99M10.htm

# APPENDIX R

## U.S. DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ACCIDENT INVESTIGATION REPORT (FEBRUARY 17, 1999)

U.S. Department of Labor
Mine Safety and Health Administration
Protecting Miners' Safety and Health Since 1978

UNITED STATES DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

SOUTH CENTRAL DISTRICT
Metal and Nonmetal Mine Safety and Health

Accident Investigation Report
Surface Nonmetal Mine
(Sand & Gravel)

Fatal Exploding Vessel Under Pressure Accident

RDO Equipment Company
I.D. No. ZEL
at
Trinity Materials Incorporated
Waco Pit
Waco, McLennan County, Texas
I.D. No. 41-03492

February 17, 1999

by

Michael C. Sanders
Mine Safety and Health Inspector

Donald Peiffer
Physical Scientist

Richard Dunst
Chemical Engineer

Originating Office
Mine Safety and Health Administration
South Central District
1100 Commerce Street, Room 4C50
Dallas Texas 75242-0119

Doyle D. Fink
District Manager

---

## GENERAL INFORMATION

Brad Johnson, service technician, age 35, was critically injured at about 1:30 p.m., on February 17, 1999, when a tire exploded after heat had been applied to the rim. He died on March 1, 1999. Johnson had 10 years experience as a service technician, 5 years with this employer. He had not received training in accordance with 30 CFR part 48.

MSHA was notified at 2:00 p.m. on the day of the accident by a telephone call from the safety director for the mining company. An investigation was started the same day.

The Waco Pit, a surface sand and gravel operation, owned and operated by Trinity Industries, Inc., was located near Waco, McLennan County, Texas. The principal official was Walter Poston, manager. The plant and pit were normally operated one, 10½-hour and one, 12½-hour shift a day, five days a week. A total of 23 persons was employed.

Sand and gravel was extracted by dragline and hauled to the plant where it was washed, sized and stockpiled. The finished products were sold for use in the construction industry.

The victim was employed by RDO Equipment Company, an independent contractor in Hewitt, McLennan County, Texas. The contractor was enlisted by the mine operator to repair the brakes on a haulage unit. The principal operating official was Bradley Campbell, general manager.

The last regular inspection at this operation was completed on September 9, 1998. Another inspection was conducted at the conclusion of this investigation.

## Physical Factors Involved

The accident occurred in the main shop building at the plant. The equipment involved was a 1975 Euclid B-30 tractor and bottom dump trailer rated at 60,000 pounds capacity. The trailer had been removed from service to repair the left rear brakes.

The tire was a Firestone tubeless type Super Rock Grip WB size 29.5 X 25 with 28-ply rating. It weighed approximately 1500 pounds. The diameter was 67 inches and tread width was 26 inches. The

tire was mounted on a 25-inch diameter rim secured with a five-piece lock-ring assembly. The tire and rim assembly was secured to the wheel with 20 wheel clamps, tensioning washers and nuts. Normal cold operating pressure was 60 PSI.

The oxygen/acetylene cutting torch used to heat the rim was mounted on a two-wheel cart. The compressed gas cylinders had been secured to the cart with a chain and provided with protective valve covers. The heating tip was a multiple flame heating nozzle (rosebud).

Laboratory tests indicated that the application of heat caused the tire material to produce combustible gases inside the tire. The heated rim and tire provided an ignition source for the combustible gases, which resulted in the explosion.

The victim was using a fork lift truck to remove the tire. The fork lift was a Hyster model H80C, rated at 8,000 pounds load capacity.

## Description of the Accident

On the day of the accident, Brad Johnson (victim) reported to the mine shop at 9:00 a.m. and received his work assignment from Robert Farmer, purchasing agent for Trinity Materials. Johnson was assigned to repair the brakes on the Euclid B-30 trailer. Johnson and Terry Heard, mechanic for Trinity Materials, backed the trailer into the maintenance shop. Johnson then drove Heard to the pit to pick up the fork lift. Heard drove the fork lift back and parked it in the shop near the trailer.

Heard went about other duties in the shop while Johnson jacked up the trailer and supported the left rear with a jack stand. He removed the wheel clamps, tensioning washers and nuts then positioned the fork lift with the forks under the tire. He wrapped a chain around the back of the tire/rim assembly and attached it to the load carrier guard on the fork lift.

Johnson attempted several times to loosen the tire/rim assembly from the wheel by hammering on the back of the rim and tugging on it with the fork lift. He also used compressed air to remove any sand and gravel lodged between the rim and wheel that might be binding the assembly.

At about 12:30 p.m. Johnson, Heard and Farmer stopped for lunch. Johnson and Heard discussed the problem of the rim being stuck to the wheel. After lunch, Heard suggested that they let the air out of the tire. Johnson removed the valve cap and depressed the valve core for 10 to 15 minutes. Johnson attempted several more times without success to remove the tire and rim assembly by tugging on it with the fork lift.

The jack stand had begun to slip out of place so Johnson repositioned it and then asked Heard about using heat. Heard replied that it was up to Johnson. Johnson positioned the oxygen/acetylene cart behind the left rear of the trailer and began to heat the rim. After 45 minutes to an hour, Johnson called out for Heard to come to the trailer. As Heard approached the right side rear of the trailer the tire exploded throwing him backward. Heard recovered

momentarily and found Johnson lying unconscious against the inside of the right side rear tire.

Johnson's pants leg was on fire and while Heard was extinguishing the flame, Robert Villa, plant manager, arrived. They pulled Johnson from under the trailer. He did not have a pulse and was not breathing. Heard administered five or six chest compressions and Johnson's pulse was restored and he began breathing on his own. Villa administered first aid to control bleeding and Farmer called the local 911 emergency assistance number. The sheriff's deputies and an ambulance arrived a short time later. Johnson was transported to a local hospital, where he died on March 1, 1999.

## CONCLUSION

The accident was caused by the application of heat to the tire rim, which caused a buildup and subsequent ignition of combustible gases inside the tire.

## VIOLATIONS

**RDO Equipment Company**

Citation No. 7874001 was issued on February 17, 1999, under the provisions of section 104(a) of the Mine Act for violation of 30 CFR 56.4500:

> A fatal accident occurred at this operation on February 17, 1999, when a tire exploded while a contractor employee was attempting to remove the tire/rim assembly from the rear of a Euclid B-30 trailer. After several attempts to remove the assembly failed, heat was applied to the rim with a torch. The heat generated combustible gases inside the tire which resulted in an explosion.

This citation was terminated on February 26, 1999 after the contractor issued a hazard alert to all employees and provided training nationwide in safe work practices for removing wheels from mobile equipment and prohibited the use of heat from any source.

**Trinity Materials, Inc.**

Citation No. 7874002 was issued on April 5, 1999, under the provisions of section 104(a) of the Mine Act for violation of 30 CFR 56.4500:

> A fatal accident occurred at this operation on February 17, 1999, when a tire exploded while a contractor employee was attempting to remove the tire/rim assembly from the

rear of a Euclid B-30 trailer. After several attempts to remove the assembly failed, heat was applied to the rim with a torch. The heat generated combustible gases inside the tire which resulted in an explosion.

This citation was terminated on April 8, 1999, after the mine operator provided training at all company operations in safe work practices for removing wheels from mobile equipment and prohibited the use of heat from any source.

**Related Fatal Alert Bulletin:**

## Appendix I

### List of Participants in the Investigation

**RDO Equipment Company**

Timothy Lowe ... service manager, hewitt shop
William Cody Brown warranty/safety manager
Bradley Campbell ... general manager, product support

**Trinity Materials, Inc.**

Steven Andrews ..... safety director
Arturo Munoz ..... safety manager
Robert Villa ..... plant manager
Terry Heard ..... mechanic

**Mine Safety and Health Administration**

Michael C. Sanders ..... mine safety and health inspector
Donald Peiffer ..... physical scientist
Richard Dunst ..... chemical engineer

## Appendix II

## Executive Summary of Laboratory Analysis Trinity Materials, Inc. Mine ID #41-03492, MSRS 049921

A laboratory investigation was conducted at the Approval & Certification Center (A&CC) as part of the accident investigation for MSHA, Metal and Nonmetal Mine Safety & Health, South Central District on the tire explosion accident that occurred at Trinity Materials, a surface sand and gravel aggregate facility. The laboratory investigation included literature review, visual and microscopic examination, and ignition and heating tests on the damaged and undamaged liner materials.

After completion of the laboratory testing and analysis, it was concluded that the most likely event that caused the accident was the heating of the rim and brake drum assemblies with an acetylene cutting torch. The heat from the acetylene torch was conducted through the rim and into the tire material. The tire material decomposed and produced hot embers and a combustible gas mixture within the tire. The heated tire material provided an ignition source for the combustible gases which subsequently ignited, causing the tire to explode.

Given that the tire before the explosion was at least at an initial pressure of about 36 psig, a maximum explosion pressure of approximately 325 psig could have developed. This explosion pressure would be over 3 times greater than would develop from a combustion explosion at normal atmospheric

pressure and over 3 times greater than the pressure at which the tire would be expected to fail if overpressurized with air. The rate of explosion pressure rise could have been about 7500 psi/sec and would be several times greater than would have developed from a combustion explosion at normal atmospheric pressure. This magnitude of maximum pressure and rate of pressure rise from an explosion in the tire is consistent with the degree of physical damage observed at the accident site.

Comprehensive test results can be obtained from the Chief of the A&CC, RR 1, Box 251, Industrial Park Road, Triadelphia, West Virginia 26059.

http://www.msha.gov/FATALS/1999/FTL99M10.htm

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No. 08-404

Supreme Court, U.S.
FILED
OCT 21 2008
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

DARLETTA ROCHELLE JOHNSON,

*Petitioner,*

*v.*

TRANSIT MIX CONCRETE & MATERIALS CO. and TRINITY MATERIALS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE ELEVENTH DISTRICT

## BRIEF IN OPPOSITION

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## STATEMENT PURSUANT TO RULE 29.6

Trinity Industries, Inc., a publicly held company, is the ultimate parent of Respondents. No other publicly held company owns 10% or more of the stock of either of the Respondents.

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This brief in opposition is being filed jointly by both Respondents, which were defendants below. Respondents will be referred to collectively as "Trinity."

## STATEMENT OF THE CASE

This wrongful death and personal injury suit was tried in state court on a theory of liability recognized by section 414 of the RESTATEMENT (SECOND) OF TORTS (1977) and adopted as controlling law in Texas.[1] While the jury found for Petitioner, the court of appeals reversed. Its reversal had nothing to do with the scope or effect of MSHA[2] (Federal Mine Safety and Health Act, 30 U.S.C. §§801 *et seq.*), given that no MSHA-based claim was submitted to the jury. Instead, the court of appeals reversed solely because Petitioner presented at trial no evidence to support a duty under a state law claim.

### A. Course of Proceedings and Disposition of the Courts Below.

Petitioner brought suit under the Texas Wrongful Death Act and Survival Statute, seeking damages for the death of her husband, Brad Johnson, Sr. ("Johnson"). Johnson was fatally injured while working as an independent contractor at Trinity's surface mine. RR2:160-61, 176-77; 4:151, 232-33, 245-46, 248-49, 268; 6:99.[3]

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1. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985).

2. "MSHA" will be used interchangeably to refer to the Act itself and the agency that enforces the Act.

3. "RR" denotes reporter's record. "CR" denotes clerk's record, and "SCR" supplemental clerk's record.

At the trial of this case, the jury answered "yes" to the only two liability questions submitted. In accord with RESTATEMENT section 414, Question 1 asked the duty question – whether Trinity exercised control over the work that caused Johnson's death – and Question 2 conditionally asked whether Trinity breached a duty by acting negligently:

**QUESTION NO. 1**

Did TRINITY MATERIALS/TRANSIT MIX exercise control of the work activity that caused the death of Brad Johnson, Sr.?

Answer "Yes" or "No."

Answer _____

If you have answered Question No. 1 "Yes", then answer the following question. Otherwise, do not answer the following question.

**QUESTION NO. 2**

Did the negligence, if any, of those named below proximately cause the occurrence in question?

**"NEGLIGENCE"** as to Brad Johnson, Sr. means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

**"NEGLIGENCE"** when used with respect to TRINITY MATERIALS/ TRANSIT MIX means the failure to use ordinary care with regard to the exercise of control, if any, over the work activity of BRAD JOHNSON, SR. that caused his death.

**"ORDINARY CARE"** means that degree of care that would be used by a person or entity of ordinary prudence under the same or similar circumstances.

**"PROXIMATE CAUSE"** means that cause, which in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer "Yes" or "No" for each of the following:

a. Trinity Materials/Transit Mix _____

b. Brad Johnson, Sr. _____

You are instructed that, since the Defendants are corporations, their conduct is of their agents, servants, employees, and vice-

> principals, and any negligence of an agent, servant, employee, or vice-principal of Defendants, in the performance of his or her duties, is the negligence of the Defendants.[4]

3SCR:33-34. The remainder of the jury charge consisted of one question on proportionate responsibility (*i.e.*, asking the jury to apportion responsibility as between Trinity and Johnson) and two questions on compensatory damages. 3SCR 35-39.

On appeal, the Texas Court of Appeals held that Trinity owed no duty to Johnson because there was no evidence that Trinity had exercised control over the work activity that had caused Johnson's death. *Transit Mix Concrete & Materials Co. v. Johnson*, 205 S.W.3d 92, 96 (Tex. Ct. App. 2006) (cited as *Johnson*). Therefore, the court of appeals reversed and rendered a take-nothing judgment against Petitioner. *Id.*

Petitioner sought review in the Texas Supreme Court, presenting issues that focused on the court of appeals' holding that the evidence did not support the verdict:

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4. Texas does not follow a general verdict format but instead asks the jury to answer specific questions, as shown by the multi-volume pattern jury charges used in Texas. *See generally* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES.

## ISSUES PRESENTED

### I. Existence of Duty and Broad Form Submission

The issue of whether a mine owner exercised control over an independent contractor's work activity is a question of fact for the jury. In broad form as required, jury question 1 submitted the exercise of control, and jury question 2 submitted negligence. Abundant evidence shows that Trinity exercised control over Brad Johnson's work. Trinity's failure to follow its own safety regulations and Trinity's failure to exercise control reasonably, resulted in Brad Johnson's death.

- Is there legally sufficient evidence that Trinity exercised control over part of Brad Johnson's work activity on the day of the accident (submitted in Jury Question 1) and failed to exercise that control reasonably (submitted in Jury Question 2)?

- Did the broad form submission of exercise of control and negligence submit the adopted Trinity safety regulations and its failure to follow those regulations in absence of any objection?[5]

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5. As Trinity pointed out in the Texas Supreme Court, this sub-issue was Petitioner's belated attempt to re-write the jury (Cont'd)

## II. Failure to Comply With *Pool*

> The guidelines of *Pool v. Ford Motor Co.* require a court of appeals, when it holds that evidence is factually insufficient, to detail that evidence that explains why the evidence is insufficient. This Court in two cases has held that *Pool*'s standard applies equally to legal insufficiency review.
>
> - Did the court of appeals err in failing to detail why the evidence, asserted to support Trinity's exercise of control over the work activity that caused the death, was "no evidence."

Petitioners' Brief on the Merits at xi-xii. On the basis of those issues presented, the Texas Supreme Court denied review.

After review was denied, Petitioner filed a motion for rehearing. In that motion, Petitioner not only continued to argue that the evidence supported the verdict, but also argued for the first time that Trinity owed a non-delegable duty under MSHA and the common-law doctrine of inherently dangerous activity. Petitioners' Motion for Rehearing at 2. Trinity

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(Cont'd)
charge to eliminate the requirement that Petitioner could not meet, namely, a "yes" answer to Question 1 (the duty question), which was a condition to Question 2 (the breach of duty question). *See* Response to Petition for Review at 5-8; Respondents' Brief on the Merits at 10-16.

responded in part that the new issues were waived because they had not been submitted or requested at trial. Response to Motion for Rehearing at 4-6.[6] The Texas Supreme Court denied the motion for rehearing.

**B. Statement of Facts.**

Trinity owns and operates a surface mine for sand and gravel. RR2:160-61, 176-77; 4:232-33. Trinity hired Johnson as an independent contractor to do mechanic work. RR4:151, 245-46. On the day of the accident, Johnson was assigned to repair the brakes on a dirt hauler known as a Euclid B-30. RR4:248-49, 268; 6:99.

Before starting the brake job, Johnson began to remove the tire and wheel assembly next to the brake drum. RR6:100-04. The assembly, however, would not come off because it was clogged with debris. RR5:11, 19, 28-30; 6:74-75, 106-08. Johnson unsuccessfully attempted to remove the debris by various methods, sometimes with the help of a Trinity employee named Terry Heard. *See* RR5:160; 6:77, 108-12, 116-17, 132-34, 145, 153-54. Ultimately, Johnson decided to try to remove the debris by heating it with a welding torch. RR6:112-14, 144-46, 150. Johnson borrowed Trinity's welding machine from Heard, before Heard had to return to his own job. RR6:116-17, 134-35, 141-42.

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6. For example, Trinity's Response to the Motion for Rehearing stated at page 2 that "this case does not raise either of these alleged exceptions to the "no duty" rule [*i.e.*, an MSHA-based duty or a common-law duty as to inherently dangerous activity]." Trinity added at the same page of its response: "But this Court need not reach that issue because Petitioner waived these exceptions or claims in a number of ways, including not requesting their submission to the jury."

Shortly afterwards, Johnson spoke with two other Trinity employees – Benito Perez and Bob Farmer. RR4:250, 284-85. Both men walked by Johnson's work area minutes before the fatal accident. RR4:251, 279-80, 285.

Johnson asked Perez for help, explaining that the wheel would not come off. RR4:284-85; RR5:6. Perez, a Trinity mechanic, said that Johnson was not doing the job right and should use a steam cleaner to remove the debris. RR4:279-80, 285; 5:6-7, 11, 28-31. Perez said he had to fix a water pump but would be back in a few minutes to help Johnson. RR4:284-85; 5:10-11, 32-33.

When Farmer walked by, Johnson was holding a welding torch in the air. RR4:251, 255, 270. Farmer asked what he was doing, and Johnson replied that he was using heat to try to remove the wheel. Farmer said, "Okay," and left. RR4:250.

After Farmer left but before Perez returned, Johnson called out for help to Heard, who was working nearby. RR6:119. Heard replied that he was too busy and that Johnson would have to "hang on" a couple of minutes. RR6:119-20. Then the tire exploded from the heat of the welding torch, causing Johnson's fatal injuries. RR6:119-23.

The thrust of Petitioner's case at trial was that Trinity never warned Johnson about the danger of heating a pressurized tire. RR2:147-49. That evidence did not, however, match the theory of liability in the court's charge, which required Petitioner to prove that Trinity had exercised control of the work activity that

caused Johnson's death. 3SCR:33-34. Indeed, any such exercise of control was negated by Petitioner's own evidence that:

- Trinity did not tell Johnson or anyone else not to heat a tire;
- Trinity did not warn Johnson about the risk of an explosion from heating a tire;
- Trinity did not require that Johnson be trained not to heat a tire and wheel assembly; and
- Trinity did not adopt MSHA's tire and rim safety program, which would have dealt with the specific work activity that caused Johnson's death.

RR2:191-92, 202, 204, 208-09, 228; 3:14-15, 18; 4:90-93, 137-39, 143, 198-200, 205-07, 238-39, 255-57; 5:53-55, 57, 75-76, 159, 182; 6:70-71, 84-86, 90-93, 95-96, 112, 176, 178, 183, 229; *see also* RR2:198; 4:11-12, 82-84, 95-96, 115-16; 5:120-22; PX 7-13, 19, 20-24 (Trinity safety rules, policies, and safety documents, all containing no reference to heating a tire).

## C. Correction of Misstatements in the Petition.

The petition creates the false impression that the lower courts rejected an MSHA-based duty. It does so by failing to disclose the following: (1) the trial court submitted only one theory of liability, which required Petitioner to prove that Trinity exercised control over

the work activity that caused Johnson's death; and (2) Petitioner did not submit or request any jury question or instruction based on MSHA. Given that no MSHA-based theory of liability was submitted at trial, the court of appeals did not address any issue relating to MSHA's scope or effect.

## REASONS FOR DENYING THE PETITION

### A. The Court Lacks Jurisdiction over the Petition.

#### 1. To be reviewable in this Court, a federal issue must have been properly presented or addressed by the lower courts.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court will not consider a petitioner's federal claim unless it was either properly presented to or addressed by the state court. *See Adams v. Robertson*, 520 U.S. 83, 86-88 (1997); *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-20 (1983); *Safeway Stores v. Oklahoma Grocers Ass'n*, 360 U.S. 334, 342 n.7 (1959) (federal preemption claim could not be considered because it was not made below).[7]

When the highest state court is silent on a federal question, the Court assumes that the issue was not properly presented, and the petitioner bears the burden

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7. Some opinions of this Court have held that section 25 of the Judiciary Act furnishes the Supreme Court with no jurisdiction unless a federal question has been both raised and decided by a state court, while other opinions have treated this requirement as merely a prudential restriction. *See Illinois v. Gates*, 462 U.S. 213, 217-20 (1983).

of defeating this assumption by demonstrating that the state court had "a fair opportunity" to address the federal question. *Adams*, 520 U.S. at 86-87. To satisfy that requirement, the petitioner must establish that the federal claim was raised "at the time and in the manner required by the state law." *Id.* at 87. Thus, a petitioner's failure to comply with a state procedural requirement may serve as an independent and adequate state-law ground for the state court's judgment, barring jurisdiction in this Court. *Id.*

Moreover, when the decision of the state court might have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, the Court will not undertake to review the decision. *Williams v. Kaiser*, 323 U.S. 471, 477-78 (1945). The party seeking review must demonstrate that no state ground can account for the decision below. *Durley v. Mayo*, 351 U.S. 277, 281 (1956).

Applying those principles, the Court held that it lacked jurisdiction in *Michigan v. Tyler*, 436 U.S. 499 (1978), and *Osborne v. Ohio*, 495 U.S. 103, 123 (1990). In the former case, the petitioner failed to present a federal standing question in conformance with state procedure. *Michigan v. Tyler*, 436 U.S. at 512 n.7. In *Osborne*, the petitioner failed to request a jury instruction of scienter as required by a state procedural rule that "serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Osborne*, 495 U.S. at 123. In both cases, the petitioner's failure to present an issue in conformity with a legitimate state procedure was an independent

state law ground adequate to support the lower court's judgment, thus precluding this Court's jurisdiction.

The jurisdictional defect present in *Michigan v. Tyler* and *Osborne* is also present here. As will be shown in the next section of this brief, the only claim that Petitioner presented in the trial below was a purely state law claim, and the court of appeals merely held that the evidence presented at trial did not support the jury's verdict under that claim. Further, Petitioner presented no federal preemption argument to the state courts, and no such issue was ever decided by the state courts.

**2. No federal issue was presented or addressed below because the state court merely held that no evidence supported a state law claim.**

In *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985), Texas adopted RESTATEMENT (SECOND) OF TORTS § 414 (1977) (cited as RESTATEMENT) to define the duty owed by a premises owner to an independent contractor. Under RESTATEMENT section 414, a premises owner owes no duty to protect a contractor from injuries caused by the contractor's own work activity unless the owner retained control of that activity and then failed to exercise its control with reasonable care. *Id.; see also Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) (per curiam) (holding that control must exist over the injury-producing activity). The Texas Supreme Court later clarified that retained control can be proved in two ways – by contractual terms that expressly retain control over the work, or by the actual exercise of control regardless of any contractual

terms. *See, e.g., Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002).[8]

Following those principles of Texas law, the trial judge in this case submitted two liability questions to the jury, the second of which was conditioned on a "yes" answer to the first question:

> **QUESTION NO. 1**
>
> Did TRINITY MATERIALS/TRANSIT MIX exercise control of the work activity that caused the death of Brad Johnson, Sr.?
>
> * * * *
>
> If you have answered Question No. 1 "Yes", then answer the following question. Otherwise, do not answer the following question.
>
> **QUESTION NO. 2**
>
> Did the negligence, if any, of those named below proximately cause the occurrence in question?
>
> * * * *

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8. As to claims brought later than the one in question here, the Texas Legislature added an element of actual knowledge in certain kinds of cases against premises owners. *See, e.g., Phillips v. Dow Chem. Co.*, 186 S.W.3d 121, 132-33 (Tex. Ct. App. 2005) (discussing chapter 95 of the Texas Civil Practice & Remedies Code).

> **"NEGLIGENCE"** when used with respect to TRINITY MATERIALS/TRANSIT MIX means the failure to use ordinary care with regard to the exercise of control, if any, over the work activity of BRAD JOHNSON, SR. that caused his death.
>
> * * * *

3SCR:33-34. In accord with section 414 of the RESTATEMENT, Question 1 was the fact question on duty.[9] Question 2 – answered only if Question 1 was answered "yes" – was the fact question on breach of duty.

No other theory of liability was submitted or requested by Petitioner. Indeed, Petitioner's only charge objection was to propose slightly different language on control in Question 1, which confirmed Petitioner's intention to submit a claim under section 414 of the RESTATEMENT. 3SCR:43-49, 53-55.[10]

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9. Under Texas law, the jury in a case like this one may determine the factual predicate for duty – that is, whether control existed. *See, e.g., Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001) (noting submission of jury question on control).

10. Petitioner submitted a question, definition, and objection at the formal charge conference incorporating "retained control." SCR:46-49, 53-55. Petitioner had no basis for doing so because there was no written contract governing Johnson's work, as the court of appeals noted. *Johnson*, 205 S.W.3d at 95. In the absence of a contract, control is to be shown through the exercise of control in accord with the questions submitted by the trial court. *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). Petitioner did not appeal the trial court's refusal to include the concept of retained control in the jury charge.

Consequently, under Texas law, Petitioner waived all other theories of liability. *See, e.g., Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997) (claim waived, in part, by failing to request a jury question on control).

Also under Texas law, the sufficiency of the evidence must be tested on appeal under the wording of the submitted charge. *See, e.g., Jackson v. Axelrad*, 221 S.W.3d 650, 657 (Tex. 2007); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (failing to assert applicability of federal law). That is exactly what the court of appeals did in this case. It held that Petitioner presented no evidence to support the jury's "yes" answer to Question 1, the duty question that asked if Trinity had exercised control over the work activity that caused Johnson's death. *Johnson*, 205 S.W.3d at 96.

In so holding, the court of appeals never considered MSHA because no MSHA-based issue was submitted or requested at trial. Petitioner did not propose a jury question asking whether Johnson was a "miner" under MSHA. Petitioner did not request an MSHA-based negligence per se theory like the one submitted in the case cited by Petitioner of *Lieberger v. Walter Co.*, 2005 WL 3784970, 74 Pa. D. & C. 4th 270, 290-93 (Pa. Com. Pl. 2005) (denying motion for summary judgment against MSHA-based negligence per se claim). Petitioner did not request an instruction on non-delegable duty under MSHA, as did the plaintiff in another case cited by Petitioner, namely, *Gibby v. Noranda Minerals Corp.*, 905 P.2d 126, 130-31 (Mont. 1995) (upholding propriety of instruction given). Petitioner did not seek, under

RESTATEMENT section 286, a standard of care definition based on MSHA, as discussed in a third case that cited in the Petition for Writ of Certiorari, *Burnett v. Imerys Marble, Inc.*, 116 P.3d 460, 462-65 (Wyo. 2005) (affirming summary judgment in part because plaintiff was not a "miner" under MSHA). Likewise, Petitioner did not request the trial court to incorporate MSHA into a jury submission under RESTATEMENT sections 413 or 424, which are mentioned at page 21 of the Petition for Writ of Certiorari.

Instead, the only theory submitted or requested at trial was based on RESTATEMENT section 414. Based on that submitted theory, the court of appeals reversed because there was no evidence of an element of that theory, that is, no evidence that Trinity had controlled the work activity that caused Johnson's death. *Johnson*, 205 S.W.3d at 96.

After the court of appeals' reversal, Petitioner sought review in the Texas Supreme Court. In that court, Petitioner presented issues aimed at the court of appeals' ruling that the evidence did not support the verdict:

## ISSUES PRESENTED

### I. Existence of Duty and Broad Form Submission

The issue of whether a mine owner exercised control over an independent contractor's work activity is a question of fact for the jury. In broad form as required, jury

question 1 submitted the exercise of control, and jury question 2 submitted negligence. Abundant evidence shows that Trinity exercised control over Brad Johnson's work. Trinity's failure to follow its own safety regulations and Trinity's failure to exercise control reasonably, resulted in Brad Johnson's death.

- Is there legally sufficient evidence that Trinity exercised control over part of Brad Johnson's work activity on the day of the accident (submitted in Question 1) and failed to exercise that control reasonably (submitted in Jury Question 2)?

- Did the broad form submission of exercise of control and negligence submit the adopted Trinity safety regulations and its failure to follow those regulations in absence of any objection?

## II. Failure to Comply With *Pool*

The guidelines of *Pool v. Ford Motor Co.* require a court of appeals, when it holds that evidence is factually insufficient, to detail that evidence that explains why the evidence is insufficient. This Court in two cases has held that *Pool*'s standard applies equally to legal insufficiency review.

- Did the court of appeals err in failing to detail why the evidence, asserted to support Trinity's exercise of control over

> the work activity that caused the death, was "no evidence."

Petitioner's Brief on the Merits at xi.[11]

After considering those issues, the Texas Supreme Court denied review, prompting Petitioner to file a motion for rehearing. In that motion, Petitioner again argued that the evidence was sufficient to support the verdict. In addition, Petitioner belatedly attempted to raise two issues. First, Petitioner argued that Trinity owed a non-delegable duty under MSHA to train independent contractors on how to do their work safely. Second, Petitioner argued that, under *Loyd v. Herrington*, 143 Tex. 135, 138-39, 182 S.W.2d 1003, 1004 (1944), an "employer has a duty to see that work of an inherently dangerous character is performed by his independent contractor with due care for the safety of others." Not argued in the motion for rehearing was any issue of federal preemption. The motion was properly denied.

The denial of rehearing was especially proper with regard to the newly minted issues regarding MSHA and inherently dangerous activity. Under Texas law, a "judgment must be supported by the pleadings, the evidence, ***and the jury's verdict***." *Boatright v. Tex. Am. Title Co.*, 790 S.W.2d 722, 727 (Tex. Ct. App. 1990) (emphasis added) (citing TEX. R. CIV. P. 301). Thus, a "judgment based on an omitted issue may not be

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11. The same issues, with slightly different wording, appeared on page ix of Petitioner's Petition for Review in the Texas Supreme Court.

rendered." *Id.* In addition, the Texas Supreme Court will not consider arguments not presented in both the trial court and the court of appeals. *See* TEX. R. APP. P. 33.1(a); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 70 (Tex. 2005) ("Because this issue [whether the Federal Arbitration Act is "reverse preempted" by the McCarran-Ferguson Act] has not been reviewed by the courts below, we decline to reach the issue and express no opinion as to the merits of this argument.").

As shown in detail above, Petitioner did not try an MSHA-based claim, but a state law claim under section 414 of the RESTATEMENT. The sufficiency of the evidence to support that state law claim was the sole issue decided by the court of appeals. Petitioner then sought review from the Texas Supreme Court on state law grounds, and Petitioner never presented the issue of federal preemption. Given that Petitioner failed to present a federal issue below, and given that the Texas courts adjudicated this case on adequate state law grounds wholly independent of any federal issue, this Court lacks jurisdiction over the petition. *See Osborne*, 495 U.S. at 123.

### B. MSHA Does Not Require States to Create Tort Claims or to Render Judgments on Theories Not Presented to the Trier of Fact.

Since no federal question was properly presented or addressed below, Trinity will not burden this Court with any extensive briefing on Petitioner's preemption issue. The issue lacks merit, however, for the reasons summarized below.

Petitioner's new federal preemption argument fails for four fundamental reasons. First, States are not obligated to create tort causes of action for violations of federal regulations; indeed, they could constitutionally eliminate all tort claims. Second, MSHA has its own enforcement mechanisms; it does not depend on state tort law to enforce its provisions. Third, the application of RESTATEMENT section 414 in a state court does not preclude MSHA from enforcing its regulations. Fourth, MSHA does not suspend state rules of trial and appellate procedure; in particular, it does not require state courts to render judgments on theories not submitted to the trier of fact. The first three reasons support the Supreme Court of Indiana's ruling that MSHA does not create a duty under Indiana tort law in *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1143-44 (Ind. 2006). The fourth reason supports the rulings of the Texas courts below.

Invoking *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), Petitioner argues the general proposition that preemption principles can apply to state tort law. A far different case from this one, *Riegel* invalidated state tort law that threatened to undermine federal regulations by imposing liability for a medical device that met the stringent standards of the Medical Device Act (MDA). *Riegel* noted that the MDA's exclusivity provision "does not prohibit a State from providing a damages remedy for claims premised on a violation of FDA regulations." *Id.* at 1011. *Riegel* did not hold that States must create tort liabilities to match federal regulations.

Finally, preemption fails because the MSHA training regulations that Petitioner relies on in this Court were

not being enforced at the surface mine where Johnson's accident occurred. After the training regulations were adopted in 30 C.F.R. part 48, Congress repeatedly inserted into successive appropriations bills for the Department of Labor "language [that] specifically prohibit[ed] the use of appropriated funds to . . . enforce[e] . . . training requirements, with respect to . . . any sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mine."[12] Congress continued to do so until after the date of Johnson's fatal accident in 1999.[13]

The above issues regarding MSHA's scope and effect did not arise below.[14] The jury was never asked to

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12. *See* Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines, 64 Fed. Reg. 53085 (September 30, 1999) (to be codified at 30 C.F.R. part 46). In the preemption context, the Court has considered whether "Congress contemplated . . . enforcement." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 254 (2004).

13. *Id.* (noting that the appropriations rider for fiscal year 1999 included an authorization of funds for MSHA to propose and promulgate final training regulations, which ultimately became effective on October 2, 2000 and specifically addressed, *inter alia*, training of miners engaged in surface mining of sand and gravel).

14. In its brief before the court of appeals, Trinity sought a new trial on the ground that the trial's admission of MSHA-related evidence was reversible error because no MSHA-based claim was submitted at trial and the MSHA training regulations were not being enforced at any relevant time. *See* Appellant's Brief at 29-33. This new-trial point was never reached because the court of appeals properly decided that Petitioner failed to present any evidence to support the state law claim. *See Johnson*, 205 S.W.3d at 96.

determine any MSHA-related fact issues. For example, the jury was not asked whether Johnson was a "miner" under MSHA, whether the training regulations applied to Johnson, or whether Trinity violated MSHA on the occasion in question. Such issues were addressed in Trinity's favor at trial by expert witnesses,[15] no doubt leading Petitioner to make the tactical decision to request, not an MSHA-based theory of liability, but only state law claim based on RESTATEMENT section 414. That state law claim was the only theory of liability submitted to the jury and was, thus, the sole focus of the court of appeals' opinion. Consequently, that opinion does not in any way impede or threaten MSHA, and Petitioner is not entitled to invoke federal preemption to advance a theory of liability never submitted or requested at trial.

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15. For example, Trinity presented the following opinion testimony: MSHA hazard training does not deal at all with applying heat to tires or rims, and MSHA task training does not require the operator to instruct a mechanic on usual tasks or about the danger of applying heat on tires and rims (RR7:81, 83-85); MSHA does not require training an employee like Johnson not to apply heat to a tire and rim. (RR7:87-88); MSHA's tire and rim safety program was designed only for people who, unlike Johnson, change tires (RR7:91-92); Trinity did not violate any MSHA regulation (RR7:95); the tire rim and safety awareness program was intended for people who take rubber tires off of a metal rim, and nothing in the program deals with taking the whole wheel assembly off (RR7:124-25); no regulation required Trinity to train Johnson that he should not apply heat to the tire and rim assembly, and Trinity was not required to perform any task training for a contract worker (RR7:126-28).

## CONCLUSION

The court of appeals' opinion is an unexceptional and correct holding that Petitioner did not prove the only theory of liability submitted to the jury, a state law claim based on section 414 of the RESTATEMENT. The court of appeals did not address MSHA because no claim based on MSHA was submitted or requested at trial. Nor did Petitioner argue federal preemption to the Texas courts below. Further, Petitioner's newly raised preemption issue lacks merit. MSHA does not require the creation of corresponding state law claims and does not preempt state rules of trial and appellate procedure.

For all of those reasons, the Court should deny the petition for certiorari and grant Respondents all other relief to which they may be entitled.

Respectfully submitted,

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(3)

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No. 08-404

IN THE

# Supreme Court of the United States

DARLETA ROCHELLE JOHNSON,

*Petitioner*,

v.

TRANSIT MIX CONCRETE & MATERIALS CO. AND TRINITY MATERIALS, INC.,

*Respondents*.

**On Petition for a Writ of Certiorari to the Texas Court of Appeals for the Eleventh District**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Respondents' brief misapprehends the issue presented to this Court,[1] argues vigorously against positions Petitioner has not taken, and cherry-picks passages from the briefs below to claim the federal issue was not presented prior to the petition for rehearing in the Texas Supreme Court. A review of the record, however, plainly demonstrates that the relevant federal law and regulations were presented at trial and in each appellate review. It was consistently asserted that the federal regulations inform the application of Texas negligence law. On the basis of that record, the jury found Respondent negligent for Brad Johnson's death. Contrary to the contention advanced in Respondent's brief, nothing further was required of Petitioner – not a jury instruction that incorporated the federal regulations and not a separate and distinct cause of action based on federal law. Notably, no where in the Brief in Opposition do Respondents claim that mandatory federal safety standards, the centerpiece of the Petition and the case as presented below, are irrelevant to the determination of liability in this case.

Respondents (collectively referred to in Respondents' brief as "Trinity," as it will be here) premise their opposition to the Petition for a Writ of Certiorari in this case on two interrelated but false premises. First, Respondent erroneously asserts that no federal issue was presented below so that this Court lacks jurisdiction. Opp. 10-19. Second, Respondents set up a straw-man argument when

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[1] In fact, it fails to include the Question Presented by the Petition.

they assert that the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.*, does not require states to create a cause of action based on its violation. Opp. 19-22. Because both arguments are advanced on false assumptions, they are unavailing.

## I. THE RELEVANT FEDERAL LAW WAS PRESENTED BELOW

Contrary to Respondent's claim, the federal issue was fully presented at trial, before the Court of Appeals, and the original petition to the Texas Supreme Court.[2] At trial, extensive testimony and evidence was presented about federally promulgated mandatory safety standards and the requirement that even independent contractors be trained by the mine's operator. All Trinity officials and employees testified that the regulations of the federal Mine Safety and Health Administration ("MSHA") governed Trinity's conduct. Because there was no dispute about the controlling role of those regulations, the trial court even excluded testimony by a Trinity expert on whether the MSHA regulations applied because Congress had not appropriated funding.

The federal Mine Safety and Health Administration Act and relevant regulations were introduced into the record. (5 RR 192, 198, 200-204). Perhaps more critically, testimony at trial established that Trinity adopted the MSHA Safety and Training Regulations as its own safety program.

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[2] Respondent concedes that the timely petition for rehearing in the Texas Supreme Court raised the federal issue. Opp. 6-7.

For example, Trinity's environmental and mine safety manager was asked:

> Q. "[C]an we agree that MSHA is the authority on regulating the mining industry?
>
> A. Yes, sir.
>
> Q. And can we also agree that the MSHA regulations are the standard in the mining industry?
>
> A. Yes, sir.
>
> * * *
>
> Q. . . . the Part 48 and the Part 56 [of the MSHA] regulations applied to the mine, to Plant 174; is that correct?
>
> A. Yes.
>
> Q. And they are – and MSHA, again is the – authority in the area of mining regulations; is that correct?
>
> A. Yes, sir.
>
> Q. And these MSHA regulations create a standard by which Trinity [Transit Mix] must comply while running a mine; is that correct?
>
> A. Yes.

> Q. And that would include Plant 174, the location where this explosion occurred; is that right?
>
> A. Yes, sir.

(4 RR 11-12). Similar testimony was elicited from Haywood Walker, Trinity's Vice President (4 RR 137); Charles Latiolais, Trinity's corporate safety director (4 RR 216); Robert Farmer, Trinity's acting supervisor on the day of the explosion (4 RR 241); Arturo Munoz, Trinity's human resources and safety manager (5 RR 85-86); and Robert Villa, Trinity's plant manager (6 RR 177).

The "Fatalgram" informing mines of the April 1998 death of a worker from an explosion caused by applying heat to a tire rim and warning against the practice, received by Trinity less than a year before Johnson's death that was caused by the same procedure warned against, was also received into evidence. (PX 28, 29). Trinity's policies require it to read and act on those advisories in order "to prevent these fatalities." (3 RR 11-12, 25-26; 4 RR 13-14; PX 5).

Trinity's Andrews and Walker testified that had they heeded the warnings and provided the MSHA-required training, the explosion would not have occurred and Johnson would not have perished. (3 RR 14-15; 4 RR 53-56, 114-15, 119, 165).

Without question, the jury had a fair opportunity to consider the MSHA regulations and Trinity's failure to comply with its duty to train and specifically found Respondents' negligence proximately caused Johnson's death. Pet. App. 8a-9a.

No more was required to present and preserve the federal issue at trial. All control and negligence issues were before the jury, as the second question posed to the jury defined "negligence" as "the failure to use ordinary care with regard to the exercise of control, if any, over the work activity of BRAD JOHNSON, SR. that caused his death." (3 SCR 34). The jury's affirmative answer to that question was sufficient to cover the failure to comply with mandatory safety standards under federal law. Regardless of whether the jury actually relied on the MSHA regulations to conclude that Trinity was negligent, a Texas appellate court "must uphold a correct lower court judgment on any legal theory before it, even if the court gives an incorrect reason for its judgment." *Guaranty County Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986), citing *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73, 84 (Tex. 1939). As long as the record provides a basis, any legal theory to sustain the judgment is sufficient. *Id.* Thus, the issue was properly before the Court of Appeals.

Nonetheless, that court reversed the judgment on the basis that no duty was owed to Johnson as the employee of an independent contractor. Pet. App. 5a-6a. In doing so, the court focused solely on the evidence of whether Trinity controlled Johnson's actions, separate and apart from any way that the federal standards informed that inquiry. It did so by ignoring the citation of and argument on those federal standards in Petitioner's brief, which devoted pages 21-23 to "Trinity's Duty To Implement MSHA's Directives" and "Trinity's Duty To Ensure Contractors Comply With MSHA." *See* App. 1a-5a.

Trinity argued in the Court of Appeals against application of the MSHA regulations, asserting that the regulations do not set the standard of care for mine operators because Congress had frozen appropriations for them. Without conceding that the appropriations issue was determinative, Petitioner responded that the status of the federal appropriation was rendered moot by Trinity's adoption of the regulations as Trinity's own safety program. Appellee's Brief, Tex. Ct. of App. 31. Moreover, Trinity argued that Petitioner's expert, a long-time employee of the United States Bureau of Mines, should have been excluded because he "largely gave opinion testimony on duties imposed by federal regulations." *See id.* at 32. It is clear that Petitioner fully preserved the issue now presented to this Court.

In light of its decision that the evidence was insufficient to establish any duty on Trinity's part, the failure of the Court of Appeals to discuss the testimony or evidence relating to the MSHA regulations can only be read as accepting Trinity's argument that federal law was irrelevant to the determination of duty or suspended while appropriations were frozen. Equally relevant to the preservation issue, Petitioner engaged in an extensive discussion of the applicable federal law and how it informs the state liability inquiry in the petition for review to the Texas Supreme Court. *See* Pet. for Review 7-9, 13.

In sum, the MSHA regulations were asserted throughout this litigation. There is no basis in the record for Trinity's claim that the federal issue was never presented below.

## II. MSHA REGULATIONS INFORM THE NEGLIGENCE INQUIRY

Trinity misconstrues Petitioner's argument regarding the preemptive effect of MSHA and its regulations, and thus misses the point entirely when it contends that "States are not obligated to create tort causes of action for violations of federal regulations." Opp. 20, 21. Petitioner does not argue that MSHA requires States to create a cause of action for violations of its federal health and safety standards. Nor, as Respondent contends, does Petitioner argue that the Court's holding in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), so requires.

Rather, Petitioner maintains that MSHA sets forth a duty that went unrecognized by the Texas Court of Appeals in this case. The existence and scope of duty is a question of law, not a question of fact. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). *See also Kim v. Budget Rent A Car Sys., Inc.*, 15 P.3d 1283, 1285 (Wash. 2001); *Keller v. Koca*, 111 P.3d 445, 448 (Colo. 2005); *Elliott v. Schoolcraft*, 576 S.E.2d 796, 804 (W. Va. 2002). Here, the Texas Court of Appeals' and Trinity's focus on whether the *facts* establish a state law duty, *see* Opp. 1 ("Petitioner presented at trial no evidence to support a duty under a state law claim"), is irrelevant, even if it were true, because the duty was established pursuant to federal law.

As the Petition demonstrates at length, *see* Pet. 8-12, 15-19, MSHA imposes upon a mine's owner-operator a nondelegable duty to follow mandatory safety standards promulgated under the Act's authority. Where state tort law already provides for mine owner-operator liability, as Texas does in

wrongful death and personal injury actions, the standards for determining duty and breach of that duty cannot be less stringent than those established pursuant to the MSHA regulations.

Where federal law provides minimum standards, any state law that fails to meet those standards are preempted. *See, e.g., Hayward v. Jack's Pharmacy Inc.*, 115 P.3d 713, 719 (Idaho 2005) (holding that in cases where federal laws or regulations set forth minimum requirements for licensure of health care providers, like the Social Security Act does, *see* 42 U.S.C. § 1396r, local communities are not free to adopt lower standards because it would thwart the purpose of the federal regulation), citing *Grover v. Smith*, 46 P.3d 1105, 1110 (Idaho 2002); *Bliss v. Stow Mills, Inc.*, 786 A.2d 815 (N.H. 2001) (the federal Surface Transportation and Assistance Act of 1982 (STAA), codified at 49 U.S.C. §§ 31101 *et seq.*, establishes minimum standards, and allows for state tort liability that provides equal or greater protections against retaliatory discharge).

Although federal law may provide the applicable standard of care, traditional state tort law remedies may be used to enforce those standards. *See, e.g., Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999) (holding that federal law establishes the standards of care for air safety, but, despite federal preemption of the standards of care, traditional State and Territorial law damage remedies continue to exist for violation of those standards); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (recognizing that the Nuclear Regulatory Commission's exclusive authority to set safety standards did not foreclose the use of state tort remedies for violations of those standards).

In *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495, 513 (1996), this Court was unanimous on the proposition that state law damages remedies can be used to enforce the federal standards of care created by the Medical Devices Amendments. Thus, while a finding of preemption eliminates the application of inconsistent state tort standards of conduct, Congress' intent to preempt is preserved when federal standards of conduct (or consistent state standards) are applied.

Texas courts have suggested precisely the same thing. In *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357 (Tex. 1998) (per curiam), the Texas Supreme Court recognized that an employer aware that an independent contractor "routinely ignores applicable federal guidelines and standard company policies related to safety may owe a duty to require corrective measures to be taken or to cancel the contract." *Id.* at 357. In such instances, the employer owes the contractor's employees "a duty that any safety requirements and procedures it promulgated did not unreasonably increase, rather than decrease, the probability and severity of injury." *Id.* at 358. If requiring compliance with federal and corporate safety standards can give rise to liability under Texas law, then surely a duty applies and liability is appropriate where the federal law makes the duty owed nondelegable, where those federal safety standards were adopted as corporate policy, and where the employer, but not the independent contractor, has knowledge of those standards and of advisories such as the "Fatalgram" relevant here. *Cf.* Restatement (Second) of Torts § 424 (recognizing that a statute or regulation that specifies "safeguards or precautions for the safety of others" can be the basis for tort liability to others "caused by

the failure of a contractor employed by him to provide such safeguards or precautions."); *id.* at § 428 (imposing employer liability for injuries to independent contractor employee where the activity is carried out "only under a franchise granted by public authority and which involves an unreasonable risk of harm to others.").

It is irrelevant as well, as Respondent asserts, that MSHA has its own enforcement mechanisms. Opp. 20. Trinity does not argue, nor could it argue, that MSHA provides the exclusive remedy for its violations. Trinity cites no legislative text or history demonstrating that Congress intended to forbid states from providing remedies for MSHA violations and the conflict in state courts over the gravitational pull that MSHA regulations should exert in state tort cases advises in favor of granting this Petition. *See* Pet. 13-17 (detailing conflict). Instead, Congress plainly anticipated the exercise of state authority here. The Act's preemption and the savings clauses explicitly provide that state laws that impose stricter standards are not preempted. 30 U.S.C. § 955. While MSHA does not require States to create remedies for MSHA violations, Congress did not foreclose or prohibit states from providing alternative remedies for violations of its safety standards.

Finally the purported failure of the Department of Labor to enforce MSHA does not support Trinity's argument, particularly as Trinity was sanctioned for this incident. Instead, Texas's failure to require safety standards as stringent as the MSHA regulations operates to frustrate the federal remedial scheme. State compliance is needed to accomplish the plain federal purposes of the Act, namely, to protect all who work on mine property from the

dangers inherent in work that takes place in that venue.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

November 5, 2008

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**Excerpt from Appellees' Brief, Texas Court of Appeals for the 11th District (June 2, 2004)**

No. 11-03-00300-CV

In the Eleventh Court of Appeals

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TRANSIT MIX CONCRETE & MATERIALS COMPANY AND TRINITY MATERIALS, INC., AND TRANSIT MIX AND MATERIALS COMPANY,
*Appellants,*

v.

DARLETA ROCHELLE JOHNSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BRAD F. JOHNSON, SR., DECEASED, AND AS NEXT FRIEND OF BRAD JOHNSON, JR., JERELLE JOHNSON AND AMETHYST JOHNSON, MINORS,
*Appellees.*

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ON APPEAL FROM THE 158th DISTRICT COURT
OF JEFFERSON COUNTY, TEXAS
CAUSE No. A-164,606

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APPELLEES' BRIEF

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[p. 21]

**1. Trinity's Duty To Implement MSHA's Directives**

Trinity has a duty to implement corrective actions as directed by MSHA (2 RR 166-68; 3 RR 25; 4 RR 13-14). Andrews, Trinity's mine safety manager, adopted that duty in a memorandum entitled "Implementing Appropriate Corrective Action As Described By MSHA Mailers." (PX 5). At trial, Andrews acknowledged that if MSHA sends out a warning about a hazard associated with tires and rims, and the company is working around tires and rims on a regular basis, then the company should respond to that warning (2 RR 167-68).

Andrews testified that if a mine operator learns about a hazard, it should give the information to people working around that hazard (2 RR 164). Andrews admitted that MSHA had given Trinity at least four or five warnings prior to the accident about tire and rim safety (4 RR 102). Those specific warnings included warnings to not use heat to remove a tire and to deflate the tire before attempting removal — warnings that, if heeded, would have prevented the accident (PX 1; PX 2; PX

28; PX 29; 3 RR 14; 4 RR 114-15). Andrews admitted that if Trinity had followed its own safety policies, then it should have let Brad Johnson's employer, RDO, know about the MSHA safety rules, which included tire and rim safety (3 RR 84).

With regard to the accident that killed Brad Johnson, Andrews admitted that information in MSHA bulletins would have applied to the activities on the day of the accident (3 RR 13). Specifically, deflation of the tire, as described in the MSHA bulletin, would have applied and, if implemented, would have avoided the accident (3 RR 14). Andrews admitted that he should have seen the MSHA bulletins about tire and rim safety. Those warnings were available in many different [p. 22] places — MSHA mailers, MSHA fatalgrams, MSHA website, and so forth (4 RR 53-54; 5RR 213-14). Andrews acknowledged that he should have implemented the MSHA directives (4 RR 56).Andrews has no excuse for not doing so (Id.).

Thus, there was evidence that Trinity exercised control over Brad Johnson's work activity, but it exercised such control without reasonable care, since it did not inform Brad or his employer, or implement, the MSHA directives that would have saved Brad's life. This alone was evidence to support the jury's findings to Questions 1 and 2.

### 2. Trinity's Duty To Ensure Contractors Comply With MSHA

Plaintiff's Exhibit 14 shows MSHA's enforcement policy regarding independent contractors (PX 14; 4 RR 35-36). Trinity's witnesses, like Arturo Munoz, its

safety manager, admitted that MSHA requires production operators, like Trinity, to ensure that independent contractors comply with MSHA regulations (4 RR 36; 5 RR 121-122, 182,247-49,251; PX 14, at 9). Thus, Trinity — not the independent contractor-retained the responsibility and control over the contractor's compliance with MSHA regulations. The failure to exercise such control reasonably triggers liability. See *Lee Lewis Constr., Inc. v. Harrison,* 70 S.W.3d 778,784-85 (Tex. 2001) (holding general contractor liable when it "could have prevented Harrison's death if it had enforced its own safety rules . . .").

So too here, the jury was free to infer from the evidence that if Trinity had enforced its own safety policies and required Brad to comply with MSHA regulations, Brad Johnson's death would have been prevented. Andrews admitted as much. He acknowledged that if he had implemented tire and rim safety rules and done training on it, that would have helped prevent the explosion (4RR 114-15) [p. 23]. Thus, this evidence supports the jury's findings to Questions 1 and 2. The judgment should be affirmed.